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February 24-25, 1977**

**National Comm. on New Technological Uses of Copyrighted Works**

**Feb 77**



NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES  
OF COPYRIGHTED WORKS

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(CONTU)

Twelfth Meeting  
February 24, 1977  
February 25, 1977

Room 209  
McGraw-Hill Building  
Rockefeller Center  
New York, New York

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BEFORE:

MELVILLE B. NIMMER -- Vice Chairman  
Professor of Law  
UCLA Law School

MEMBERS OF THE COMMISSION: (in attendance)

William S. Dix  
Librarian Emeritus  
Princeton University

Arthur R. Miller  
Professor of Law  
Harvard Law School

John Hersey, President  
Authors League of America

Hershel B. Sarbin  
President  
Ziff-Davis Publishing Company

Rhoda H. Karpatkin  
Executive Director  
Consumers Union

Robert Wedgeworth  
Executive Director  
American Library Association

Dan Lacy  
Senior Vice President  
McGraw-Hill, Inc.

Alice E. Wilcox  
Director  
MINITEX

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Policy Analyst

VICE-CHAIRMAN NIMMER: I think we will open the proceedings. The Judge always starts by saying this is the twelfth meeting of the Commission.

Judge Fuld cannot be here and so I am going to serve as Chairman.

Arthur Levine will not be here, I am told, until noon; is that right?

MR. KEPLINGER: Yes.

VICE-CHAIRMAN NIMMER: You have the agenda before you.

Some of us did not receive the reports until very recently, I guess those further away from the core, but the thought was, as you recall it, that we were going to have a general discussion on the issues involved in a rather unstructured manner to permit us to exchange views, which is something that we have not done really very much up to now.



1 Are there some preliminary announcements to  
2 be made?

3 MR. KEPLINGER: As an administrative matter,  
4 I think Dan would like to have some indication of how  
5 many people would like to have lunch here in the build-  
6 ing, so that he can make arrangements for that.

7 Does anyone know?

8 (There was a show of hands.)

9 VICE-CHAIRMAN NIMMER: Can we let you know  
10 later?

11 MR. LACY: Soon enough to know how many cups  
12 of water to put in the soup. Yes, fine, by 11:00  
13 o'clock will be all right, or 11:30.

14 MR. MILLER: As an administrative matter,  
15 since the agenda is sparse, could I have some idea  
16 as to when we will break for lunch?

17 MR. KEPLINGER: About noontime.

18 VICE-CHAIRMAN NIMMER: I would think so.  
19 Do you have some preference in that regard?

20 MR. MILLER: No. I just would like to know.

21 VICE-CHAIRMAN NIMMER: Should we say 12:00  
22 noon?

23 Are there any other preliminary announcements  
24 or comments?  
25

(There was no response.)

VICE-CHAIRMAN NIMMER: All right. Then why don't we go directly to the Software Subcommittee Report. I believe Commissioner Miller is going to lead the discussion on that.

MR. MILLER: I don't know what you would like, Mr. Chairman.

There is a document dated February 18th, and it is the product of five or six subcommittee meetings over time. I would say this is about the third draft and I would characterize it as a highly preliminary draft.

The theory of the draft is in a loose sense to recognize more formally than the new statute does the copyrightability of computer programs on software, and to suggest that various provisions either be clarified in the new statute or new sections be added to clarify things not covered in the soon to be effective statute.

The theory of the subcommittee was that it was impossible to differentiate between computer software and a variety of other works that, for better or for worse, have been accorded copyright protection

1  
2 for a long, long time, such as fact compilations,  
3 telephone directories and other works of American  
4 ingenuity.

5 On the other hand, it was the subcommittee's  
6 view that the copyright protection should not extend  
7 in any way to block access to utilization of the  
8 technology or to block access to the exploitation of  
9 the computer program or software development art, so  
10 that in a sense we in the subcommittee felt that this  
11 might require some language in the legislative history.

12 Our feeling is that the existing section  
13 102(b) preserves that distinction and simply needs to  
14 be extended to the computer software field.

15 The rest of the proposal that you have in  
16 front of you I would have to characterize as a series  
17 of technical matters dealing with notice, deposit,  
18 registration and recordation to make it clear how those  
19 formalistic matters are dealt with in the software  
20 context.

21 I think motivating the subcommittee at least  
22 in part was the thought, speaking for myself, that  
23 the barn door has been unlocked and the barn has been  
24 vacated on this issue for the better part of the  
25 century.

1  
2 I would say the second motivation of the sub-  
3 committee for its posture on this is the fact that it  
4 seems relatively clear that the existing statute al-  
5 ready represents a legislative judgment that copy-  
6 rights should be extended to software. That's incon-  
7 clusive because we are in business to make independent  
8 judgments, but I think the fact of the existing statute  
9 reaching us makes it rather clear to us that any step  
10 eviscerating copyright protection in computer software  
11 would create a very uneven line in the law and would  
12 be retrogressive in terms of the existing status of  
13 the law, and probably would be politically unacceptable.

14 VICE-CHAIRMAN NIMMER: Should we have some  
15 discussion as far as we want to have it and go to the  
16 preliminary issue, should software be protected, be-  
17 fore going on to the more technical questions; assuming  
18 protection, how it is done, and so on?

19 MR. HERSEY: Mr. Chairman, I would like to  
20 speak to that and I have to say that I object in the  
21 strongest terms to our editing the existing law to  
22 open the law to copyright protection without our having  
23 had the basic discussion about whether this is something  
24 that is desirable or not.

25 I would like to ask why the vigorous objection

1  
2 I made to the oral presentation by Commissioner Perle  
3 at our meeting two months ago on this point was not  
4 opened for discussions.

5 As far back as four months ago in California,  
6 as I remember, I asked in explicit terms, and I thought  
7 I heard an affirmative response, that we would be given  
8 first some options to discuss rather than conclusions.

9 I have to ask why we haven't talked about  
10 the preliminary basic principles and constitutional  
11 questions of what copyright was intended to serve, and  
12 whether opening copyright to computers does extend that  
13 intention.

14 I have to ask why we have had a procession  
15 of witnesses from the computer industry, the information  
16 industries, but have not yet had any input on public  
17 policy issues on this thing, and yet we come to con-  
18 clusions here.

19 I certainly have not heard a thoughtful  
20 presentation of the possible effects of admitting  
21 computers to copyrights on the culture.

22 I guess I have to go back to the question  
23 that I asked at the very first meeting of this Com-  
24 mission. That is why there is only one writer on  
25 this Commission. I find myself the only voice that

1  
2 has been speaking on this issue from the very begin-  
3 ing, and I have to ask whether the Commission has  
4 mistaken what I have been saying for just the cranky  
5 opinions of an individual. I wonder whether you  
6 realize that there are strong feelings about this  
7 issue in the creative community.

8 We have on this Commission representing  
9 the so-called intellectual producers three business-  
10 men, and I wonder why we haven't tried very carefully  
11 to find out what the creative community thinks about  
12 this issue.

13 Why haven't we asked some of my betters,  
14 such as Saul Bellow and Katherine Anne Porter and  
15 Robert Warren and Robert Lowell and Ralph Ellison,  
16 who might have been asked what they think about this,  
17 and I think that we should have asked some composers  
18 and artists what they think, because I think that  
19 there is a very strong feeling, whether it is right  
20 or wrong, that it is territorial on the part of the  
21 creative community that copyright has been their  
22 territory, rightly or wrongly, and there are some  
23 very strong feelings about having machines and large  
24 commercial interests come out of the surf. I think  
25 you will find that they will be mobilized in very

1  
2 substantial opposition to this conclusion if we reach  
3 it, and there will be a stir about it.

4 I think we've got to turn back a way and  
5 talk about the basic issue, about what copyright was  
6 intended in the first place to encourage, and see  
7 whether we think that opening copyright to computers  
8 serves that intention. I don't think we have ever  
9 talked about that. I have talked about it boringly  
10 and endlessly, but we haven't discussed it.

11 I wonder why the question has never been  
12 raised whether there is any other Commissioner here  
13 who has a reasonable doubt whether we should include  
14 or open copyrights to computers.

15 VICE-CHAIRMAN NIMMER: Mr. Lacy.

16 MR. LACY: I would have some difficulties  
17 with John about the interpretation of the history of  
18 the copyright intention, the feeling that it was done  
19 to protect creative literary works, composers and  
20 artists alone and that this is an invasion of that  
21 by other sources.

22 In point of fact, one of the first works  
23 copyrighted under the first federal copyright statute  
24 was Webster's Dictionary.

25 MR. HERSEY: You know very well the intention

1 of the Constitution was to offer copyrights and patents  
2 to encourage authors and inventors, and not to encourage  
3 machines and commercial enterprises.  
4

5 MR. LACY: I don't assume that it was not  
6 to encourage commercial enterprises. In point of  
7 fact, I think one of the first motivations of copy-  
8 right made possible the profitable exploitation and  
9 the wide dissemination of the labor of people. It was  
10 very active in the minds of the authors of the first  
11 copyright laws that they were not deprived of the Con-  
12 stitution and the constitutional extension of the con-  
13 trol over that matter from the state to the federal  
14 government. That is, I don't think that the Congress  
15 presumably ever intended to exclude from this inten-  
16 tion works of utility to the country.

17 MR. HERSEY: I don't argue that.

18 MR. LACY: Please, may I just finish a few  
19 remarks and then I will shut up.

20 I don't think we are dealing here with a  
21 problem of whether we should open copyrights to  
22 computers, but it is rather for intellectual works  
23 capable of being used in computers or related to  
24 computers that we are talking about, not computers.

25 MR. HERSEY: Well, that is not the only



1  
2 point.

3 VICE-CHAIRMAN NIMMER: Just a minute, please.

4 MR. HERSEY: Excuse me.

5 MR. LACY: We are not talking about opening  
6 copyrights to intellectual works capable of being  
7 used in a computer, but I think what we  
8 are deciding is whether we should exclude those now  
9 present from the law.

10 That is, we are not seeking some opening of  
11 the law to a new field. We would be making a decision  
12 that we were going to close the protection of the law  
13 or recommend the closing of the protection of the  
14 materials that are probably covered under the present  
15 law and analogous materials that have certainly been  
16 covered in the past.

17 It does not seem to me that there is any  
18 derogation of the rights of creative literary, musical  
19 and artistic persons, which is certainly the placenta  
20 of everything we are talking about, if there is a  
21 protection of other forms of intellectual effort, as  
22 indeed the copyright law has always from its very  
23 beginning protected.

24 As a matter of fact, one of the things that  
25 has produced the strength in the law and that has given

1  
2 protection to the extent that it has protected writers  
3 is the fact that there is strong motivation for strong  
4 copyright laws that have come from the commercial ex-  
5 tension of copyrighting fields, so to me there is no  
6 hostility and there is no conflict. There is no  
7 effort to depreciate copyright or diminish the protec-  
8 tion of authors.

9 I would like to tell Mr. Hersey as a member  
10 of the author field that I feel as deeply for the rights  
11 of authors as he does.

12 I am finished.

13 VICE-CHAIRMAN NIMMER: Do you want to reply?

14 MR. HERSEY: May I just read from Section  
15 102, applying to authors: "Literary works; musical  
16 works, including any accompanying words; dramatic  
17 works, including any accompanying music; pantomimes  
18 and choreographic works; pictorial, graphic and  
19 sculptural works; motion pictures and other audio-  
20 visual works; sound recordings."

21 To add computer programs and data bases there would be  
22 a quantum jump in that list.

23 VICE-CHAIRMAN NIMMER: Arthur.

24 MR. MILLER: First, let me make a remark  
25

1  
2 about the subcommittee's process.

3 We do not wish the Commission to be left  
4 with any misapprehension regarding our attention to  
5 John's points made during earlier meetings. We con-  
6 sidered them, and we considered them at length.

7 I also think it is somewhat misleading, just  
8 as statistics no matter how simple they may appear to  
9 be, to say there is only one writer on this Commission.  
10 Dan has already fessed up to the fact that he is a  
11 member of the author's field. Mel is someone who  
12 devotes a large part of his life to writing. Judge  
13 Fuld certainly has spent years and years at the art  
14 of writing. Despite the turgidity of my twenty-six  
15 books, I view myself as a writer, so I think it is  
16 fair to say that there is only one writer of a certain  
17 kind on this Commission.

18 One might also note that there is no  
19 musician on this Commission, there is no graphic  
20 artist on this Commission, there is no computer pro-  
21 gram author on this Commission, so, as I say, I find  
22 it the view ostensibly in favor of writers.

23 To point to American copyright law as of  
24 1790 with some pristine notion of what authorship is  
25 and what a literary work is may make some sense as an

1  
2 original historic matter.

3 I personally agree with Dan in the notion  
4 that even at the outset American copyright law, let  
5 alone English copyright law from which we descend, was  
6 not designed as the unvarnished, untrampled and pri-  
7 vate preserve of so-called creative people. This is  
8 historically unsound as an original proposition, and  
9 it is demonstrably wrong in terms of the movement of  
10 the American copyright law for close to two centuries.

11 We are not dealing with a proposal that would  
12 extend copyright protection into a strange new province  
13 in which it has never been before, thereby violating  
14 virginity of the American copyright law and any notion  
15 that it previously belonged solely to the fellows or  
16 that group in the intellectual artistic community.

17 For better or for worse, because as an  
18 original matter I might have stuck up my hand the  
19 other way were I living in 1789 considering the first  
20 copyright law, but for better or for worse we have  
21 protected under American copyright law, John, in  
22 102(a), which you read with a very interesting limit-  
23 ing mentality, under the words "literary works"  
24 telephone directories, manuals for automobiles and  
25 a variety of devices that work in conjunction with

1  
2 machines, advertisements and a whole host of things  
3 that no one in their right mind would say is a creative  
4 work, but the law now says is a literary work in the  
5 sense of being an original work of authorship, "A  
6 writing of an author" if you go back to the precise  
7 language of the section, and you add to that copyright  
8 protection, for better or for worse, in Skippy Peanut  
9 Butter ads, in Snoopy Dolls, in Barbie Dolls and a  
10 whole host of garbage.

11 With respect to the proposition today that  
12 the creativity that often goes into a computer program  
13 doesn't merit the same kind of attention that the  
14 artifacts of American culture and industry would, not  
15 to grant copyright protection to computer works would  
16 represent an indefensible exception to a now fully  
17 accepted proposition in American copyrights.

18 It also, in my judgment and in the sub-  
19 committee's judgment, would have deleterious side  
20 effects, because it would simply force the developers  
21 of computer software to use the local protections of  
22 trade secrets and contractual arrangements that would,  
23 ..... we think in our judgment , not based  
24 on the greatest economic analysis or public interest  
25 analysis to be sure, ... would produce monopolistic

1 control in the software arena far in excess of what  
2 would be provided if those materials were brought under  
3 the copyright act, divested into the public domain  
4 and revealed to the general public.

5 MR. HERSEY: May I respond for a second?

6 VICE-CHAIRMAN NIMMER: Yes.

7 MR. HERSEY: On the issue of authorship, I  
8 apologize to my distinguished colleagues for their  
9 writings.

10 I would insist that I am the one person here  
11 who is a professional writer, who lives by writing,  
12 and I think you understand what I am saying about  
13 that.

14 Second, you speak of the various things which  
15 are not literary which have been protected under copy-  
16 right, and I am aware of those things and I acknowledge  
17 them, but I would suggest to you that a precedent of  
18 pollution does not necessarily mean that it should be  
19 extended.

20 This is exactly the point that I would like  
21 to have talked out, and I think there is a legal  
22 question whether because there have been bad conclu-  
23 sions we must necessarily go on to admit whatever else.

24 VICE-CHAIRMAN NIMMER: Mr. Wedgeworth.

25

1  
2 MR. WEDGEWORTH: I will very carefully say at  
3 the outset that I think I have some inkling of what the  
4 matter under discussion relates to, and I have a ques-  
5 tion about the subcommittee report, and I think indeed  
6 it can be addressed to both the subcommittee report and  
7 somewhat related to the fact that we have gone through  
8 a long period of listening to testimony and we have not  
9 had this opportunity to talk among ourselves.

10 In a sense, I think we have jumped over a  
11 step that is certainly addressed inferentially in the  
12 software report and to a much lesser extent in the data  
13 base report.

14 In the first couple of pages of the software  
15 subcommittee report it does give evidence that some  
16 thought has gone into the policy that was being put  
17 forth by the recommendations that are made, and from  
18 my perspective I would really like to see or hear some  
19 discussion of these points that were taken up in the  
20 subcommittee, Arthur, just for my own understanding.

21 VICE-CHAIRMAN NIMMER: Bob, what were you  
22 referring to specifically?

23 MR. WEDGEWORTH: Well, on the first page,  
24 for example, it says in the second paragraph: "We  
25 base this conclusion upon the determination that

1  
2 non-copyright protection is either legally uncertain  
3 or undesirable from a policy standpoint."

4 I think I understand the thread of the  
5 thought that runs through the document in that sense,  
6 that you are saying you are leaning in a certain direc-  
7 tion, but you have to infer what the policy is.

8 No one ever says what they are really talking  
9 about in terms of a policy with respect to these types  
10 of materials, and I am assuming that a great deal of  
11 discussion of this type took place within the sub-  
12 committee, and I think that I would, for one, be very  
13 much interested in hearing it or at least some parts  
14 of it.

15 VICE-CHAIRMAN NIMMER: But if I understand  
16 the crux of your question, are you asking is it true  
17 that other forms of protection are inadequate?

18 MR. WEDGEWORTH: No. I am saying that to me  
19 that is a technical legal question.

20 VICE-CHAIRMAN NIMMER: Right. Then I am  
21 not clear what you wanted.

22 MR. WEDGEWORTH: And the question that is  
23 posed seems to be why this kind of protection should  
24 be extended to computer software.

25 VICE-CHAIRMAN NIMMER: All right.



1  
2 MR. WEDGEWORTH: And what I hear coming from  
3 Mr. Hersey and the questions that I have in my own mind  
4 are much more general than that.

5 We have a whole host of things, as Arthur  
6 has indicated, that have <sup>been</sup>/extended copyright protection,  
7 and I don't think I feel, as John may have stated, that  
8 someone is deliberately trying to get around this  
9 question.

10 I don't think the questions have been raised,  
11 John, and I just want to try to back up to see where  
12 we ought to start in considering software as an intel-  
13 lectual property. There are a number of persons around  
14 this table who have far more knowledge about this than  
15 I, and I am not sure that I have the kinds of doubts  
16 that you were raising, but since there has not been  
17 any real exploration of this fundamental basis for  
18 the copyright law, there is no way for me to tell.

19 MS. KARPATKIN: Let me back up what Bob was  
20 saying in a somewhat different way.

21 First, with respect to John's feeling that  
22 the Commission should raise fundamental questions in  
23 the course of Commission discussions, we are entitled  
24 to a full exploration, if not a disposal of those  
25 fundamental questions, before we reach the point of

1  
2 discussing amendments to the copyright law, and I  
3 think that John has accurately characterized both his  
4 own persistent raising of these questions and our  
5 failure to report to this point and to come up with  
6 a Commission response, and I share his feeling that  
7 there are many fundamental questions that need to be  
8 discussed.

9 I would put it in a somewhat broader context.  
10 I hate to sound as cantankerous as John always sounds,  
11 but I feel that my particular concern was that we not  
12 proceed to conclusions without an analysis of policy.

13 I think I exhausted everything I could do to  
14 bring us to the point of dealing with the question  
15 of what policies should be guiding this Commission  
16 and how we harmonize or dispose of them, and I feel  
17 that as of now we have not reached that point in our  
18 deliberations where we know what policies we wish to  
19 implement, which is one of the reasons why John's  
20 question still remains unanswered.

21 I don't know what our policy analyst has  
22 been doing. I know that one paper was produced which  
23 there was general agreement was unsatisfactory,  
24 and yet it emerges in the list of back-up papers  
25 given to us to support the subcommittee reports on

1  
2 software and data bases. I think it should have  
3 been abandoned and perhaps burned.

4 I know that there was an attempt made to  
T-2 5 work with our policy analyst by somebody from my staff  
6 who is more skilled, and that in fact a writing was  
7 produced which outlined the policy considerations that  
8 could be before this Commission -- I have it in front  
9 of me -- and yet that, which is a quick work and sort  
10 of off the top of her head, nevertheless never found  
11 its way into any further Commission papers for deliber-  
12 ations or concerns or works.

13 What the computer software subcommittee  
14 report makes several references to, as Bob says,  
15 is policy, and I am in the dark as to what policy  
16 standpoints are being evoked there.

17 I don't know whether that subcommittee  
18 outlined its policy concerns, but I think that this  
19 Commission can't go very far, if anywhere, without  
20 asking and answering the question: What are the  
21 policy objectives of the Commission and how do our  
22 proposals respond to those objectives?

23 If we could identify the policy objectives  
24 of the Commission, then maybe we could find a spot  
25 under that woodwork for the concern of creative

1  
2 writers and deal with the objections and concerns  
3 raised by John.

4 For the purposes of the record, and mostly  
5 out of exhaustion of having raised this question in  
6 form and never in substance, I am going to outline the  
7 few policy objectives which one policy analyst quickly  
8 listed with this Commission and maybe try to provide  
9 a framework within which we can have some fruitful  
10 discussion today on the computer software issue, and  
11 if it doesn't provide a framework, then it is in the  
12 record anyway, and then maybe the staff can do some-  
13 thing with it.

14 Now, this was described as a rough outline  
15 by the policy analyst and was not intended to be dis-  
16 positive, but was to be helpful to the Commission's  
17 analyst in trying to frame issues and policy papers.  
18 She listed this handful of the objectives of CONTU's  
19 recommended actions:

20 1. Promote consistency with other copyright  
21 areas to the extent possible.

22 2 Encourage creativity (avoid discouraging  
23 creativity by making it impossible to recover develop-  
24 ment costs).

25 3. Facilitate earning a fair rate of return

1  
2 for creative efforts; avoid rewards that overcompensate  
3 or exploit a situational relationship.

4 4. Facilitate information flow to promote  
5 competition and efficiency and to promote an adequate  
6 supply of goods for consumers at reasonable competitive  
7 prices.

8 5. Minimize disruptions of the free market,  
9 but regulate as necessary to protect public welfare.

10 6. Decrease atmosphere of uncertainty.

11 MR. MILLER: I really don't believe this.

12 VICE-CHAIRMAN NIMMER: Are you through,  
13 Ms. Karpatkin?

14 MS. KARPATKIN: That at least gives a  
15 framework for policy discussions.

16 I would urge again that the Commission's  
17 staff produce the necessary policy papers to guide  
18 the balance of our consideration from now until we  
19 reach our final conclusions.

20 MR. LACY: I wanted to reply to Bob's  
21 question.

22 VICE-CHAIRMAN NIMMER: Yes.

23 MR. LACY: I should imagine there would not  
24 be any objection to the concern of the Commission as  
25 to those policy objectives, but it seems to me we have

1  
2 one kind of fundamental policy consideration.

3 We are dealing not with a de novo situation;  
4 we are dealing with nearly two centuries of  
5 development of the copyright law in the United States  
6 relating to the products of artistic efforts of  
7 all sorts.

8 The general policy has been essentially the  
9 same kind of aims that Ms. Karparkin's staff developed  
10 and the feeling that these have been best served by  
11 giving the creators of works, whether they are  
12 aesthetically pleasing primarily or simply utilitarian,  
13 the exclusive use of their works subject to limitations  
14 as to the licenses and so forth.

15 Now we have a new technology and we can have  
16 one of two sets of questions. We could say essential-  
17 ly that the basic approach is of American copyright  
18 law and what it does about other things, what it does  
19 about printed telephone directories and what it does  
20 about all of these things is wrong and that we should  
21 recommend to the Congress a general revision of the  
22 American copyright policy, or we could say that is  
23 beyond our mandate.

24 Our mandate is to establish copyright  
25 policy of the government as a whole and to see to what

1 extent we should differentiate how we should apply  
2 it and to what extent we should differentiate its  
3 treatment when we are dealing with works using new  
4 technologies. That is, one way we could go about  
5 doing this would be to say, "how should we deal with it  
6 in the smartest terms? How should we deal with the  
7 machinery that will treat data bases differently from the  
8 way we deal with the printed data base? In the  
9 case of programs, how should we deal with  
10 a program embodied on tape/<sup>differently</sup> from the way we would deal  
11 with a written out printed computer program?"  
12 Alternatively, we could say that the Commission could  
13 say that the way we deal with telephone  
14 directories is wrong and we should recommend basic  
15 changes in the copyright law itself.

16  
17 Now, to some extent we need to define our  
18 problem as to how ambitious we will be. Are we saying  
19 here is the American copyright law and what should  
20 be different in that law with respect to this new  
21 technology, or do we say the fundamental policies  
22 themselves are subject to re-examination by the  
23 Commission.

24 Those are the two points.

25 VICE-CHAIRMAN NIMMER: I would like to

1  
2 interject at this point.

3 I have some disagreement with both Dan and  
4 Arthur in a certain thrust of their argument which  
5 I think is essential, namely, it seems to me Arthur's  
6 main position --

7 MR. MILLER: Please refer to the subcommittee.  
8 Mel.

9 VICE-CHAIRMAN NIMMER: All right. The  
10 subcommittee report of which Arthur is the presenter.

11 The main thrust of it as I got it was it  
12 would be an unfair discrimination not to protect  
13 software when the law of copyrights protects comparable  
14 material, and Dan Lacy's comment was along similar  
15 lines.

16 MR. LACY: I am not saying it would be  
17 unfair.

18 VICE-CHAIRMAN NIMMER: Right, but the  
19 assumption in each case was that the existing law  
20 does treat and does protect comparable materials,  
21 and the burden is on those who would deprive software  
22 of similar protection.

23 Well, I understand that argument very well  
24 when we are talking about data bases, because data  
25 bases to me are very similar to dictionaries and



1  
2 catalogs and directories and so on. . It is just a  
3 matter of different technology for compiling these  
4 facts, and that issue itself, as Dan very well put  
5 it, is possibly debatable as to whether copyright  
6 should protect that. But the fact is copyright has  
7 for a long time protected that sort of compilation  
8 of facts, so that in that arena I understand the  
9 argument should we differentiate with respect to  
10 data bases.

11 But if I understand what we are talking  
12 about in software, I think we are talking about  
13 something quite different. Software is not the  
14 compilation of facts comparable to a dictionary.  
15 Software or/<sup>a</sup>computer program has to do with direc-  
16 tions to the machine as to how to achieve given  
17 results, and there, if there is an analogy, it is an  
18 analogy to instructions written in ordinary  
19 language. . If you talk about instructions and  
20 what is the copyright status of instructions, it is  
21 not all that clear and it is not all that established  
22 that instructions per se are protected by copyright.

23 We get back to the basic doctrine that we  
24 touched on in a previous meeting. We have talked  
25 about protection, and there is some ambiguity in the

1 cases. Some cases seem to say that there is no copy-  
2 right protection at all for works of utility of this  
3 sort, and other cases suggest that there is protection  
4 but only as against reproduction for explanation, not  
5 as against reproduction for use. Then there is the  
6 Morrissey case that Arthur Miller referred to I think  
7 in a previous meeting, which specifically involved  
8 instructions for entering a contract in which the  
9 court said that even though those instructions could  
10 be stated in several different ways, the number of  
11 ways is relatively limited and this protection is not  
12 to be forthcoming.

13  
14 At this point I am not making an argument  
15 as to how we should come out, but only suggesting  
16 that the premise that copyright is so well established  
17 in areas analogous to software itself is not necessarily  
18 correct. It has not been established from time im-  
19 memorial or even from 1790, in my opinion, that instruc-  
20 tions or works analogous to software are protected.

21 Now we get to the new act which is about to  
22 go into effect. It is true that the House Committee  
23 report does make comment that software will be pro-  
24 tected under the new law, and one might say, well, at  
25 least if it is not traditionally so, it is so now by

1  
2 virtue of the legislation.

3 Even that, in my view, is not absolutely  
4 without question, because the act itself makes no  
5 mention of software. Ordinarily, one looks to the  
6 committee report where the statute is ambiguous,  
7 although I think more and more here it is becoming the  
8 reverse where you look to the statute where the commit-  
9 tee report is ambiguous, but the statute says nothing.

10 The Senate Committee report is nowhere  
11 near as explicit about the protection of software,  
12 although there is some kind of allusion in a back-  
13 handed way that mentions software protection by the  
14 Senate Committee report, and the text of the statute  
15 in 102(b) specifically says that copyright protection  
16 shall not be forthcoming for processes, methods and  
17 that sort of thing. It is certainly conceivable that  
18 a court would say that that is what software is, that  
19 it is a process and a method and has been excluded by  
20 102(b).

21 All of this is merely to say that I think  
22 it is wrong if we reach our conclusions simply because  
23 it is existing law and we should not change existing  
24 law, that we may change it but we shouldn't, or we  
25 shouldn't recommend a change in the law.

1  
2 That then leaves us, it seems to me, with  
3 the underlying policy considerations, apart from  
4 consistency, which was the first one Rhoda mentioned.  
5 Is this the sort of thing that should be the subject  
6 of copyrights?

7 MR. LACY: A point of personal privilege.

8 VICE-CHAIRMAN NIMMER: We have to check on  
9 lunch.

10 MR. LACY: We can have a variation of a  
11 couple of people. It wouldn't matter one way or the  
12 other, but I think it is reasonably close to the point  
13 where we should have some indication now.

14 VICE-CHAIRMAN NIMMER: All right. Shall  
15 we take a show of hands as far as lunch is concerned?

16 (There was a show of hands.)

17 VICE-CHAIRMAN NIMMER: All right.

18 MR. LACY: Let me just take one minute.

19 I didn't mean necessarily that I thought  
20 everything was protected and hence there was a burden  
21 to prove that it wasn't. I was concerned with in what  
22 way should we treat the work differently if it were  
23 related to a computer from the way were it not.

24 Now, it might be that the copyright protec-  
25 tion does not extend to instructions and this is an

1  
2 argument for extending it to instructions. It could  
3 work either way.

4 MR. MILLER: Mel, let me just say for the  
5 record since I know you haven't had an opportunity  
6 to read the report that in pages 8 through 11 of the  
7 report, we do deal with the basic Morrissey problems.

8 Quite clearly, the subcommittee was not  
9 thinking of extending copyright protection to computer  
10 software in any concept in which it would not be  
11 extended in instructional modes under general principles.  
12 We well know that instructions were not all created  
13 equal. There is a difference between an instruction  
14 of the kind of simple four line game rules that were  
15 involved in Morrissey and the boiler plate statutorily  
16 prescribed insurance form/<sup>language</sup>involved in Beardsley all  
17 the way over to a fully articulated narrative descrip-  
18 tion which, loosely speaking, is instruction as in the  
19 text of Baker versus Selden, or as to any diet book,  
20 which is really nothing more than a narrative version  
21 of a set of instructions, or how to build an atomic  
22 bomb manual, which is really nothing more than a  
23 narrative version of a set of instructions.

24 So programs like sets of instructions come  
25 in all sizes, shapes and forms, some of which come so

1  
2 closely to the idea of the 102(b) environment that they  
3 would not be protected, and some of them come so close  
4 to the 102(a) environment as exemplified by the testimony  
5 we had from various people about the fact that a lot  
6 of the machine based computer aided instruction is  
7 a mixture of data base/ <sup>and</sup> software in a highly articulated,  
8 highly narrative form so that it would be absolutely  
9 indistinguishable from what are loosely called work  
10 books or even problem books or, arguably, even text  
11 books.

12 So again when we are talking about a computer  
13 we are talking about a spectrum, and the subcommittee  
14 did address the problem of the kind of short form  
15 programs that might represent a blockage of the idea  
16 or process side of the equation versus those fully  
17 articulated and developed programs that quite clearly  
18 are analogous to the 102(a) reference to literary  
19 works as interpreted by the courts.

20 MR. HERSEY: Mel?

21 VICE-CHAIRMAN NIMMER: Yes.

22 MR. HERSEY: I would like to try to back  
23 away some distance from this discussion to what might  
24 be relatively zero base thinking about this.

25 Is there no feeling around this table that

1  
2 there is an essential difference between things which  
3 are to be read with a human eye and things which  
4 cannot?

5 The thrust of what I am saying is not that  
6 the computers, computer programs and data bases should  
7 be denied protection, but simply that this is a new  
8 technology and of a kind which does represent a  
9 quantum jump from the kind of things which have been  
10 protected in the copyright law before.

11 The telephone book can be read with a human  
12 eye, but this is something different, and I wonder  
13 whether it can't be possible to think of starting  
14 from scratch and devising a statute which describes  
15 the kinds of protection that are appropriate for  
16 computer programs and data bases, and differentiating  
17 clearly between that sort of protection and the  
18 protection that we have addressed in copyrights  
19 traditionally.

20 VICE-CHAIRMAN NIMMER: That, may I say, is  
21 a distinction that the Supreme Court made in 1908  
22 that I think most people think is an unfortunate  
23 distinction. That is the piano roll case where they  
24 said the music on a piano roll with the perforation  
25 should not be regarded as a copy that is copyrightable

1 because you can't read it with the human eye.

2 Surely, you wouldn't suggest that if a  
3 novelist chose to write his novel via a computer,  
4 that that novel is not copyrightable.  
5

6 MR. HERSEY: I would presume that that  
7 would be copyrighted under the law as it stands.

8 VICE-CHAIRMAN NIMMER: But if you take your  
9 distinction; is it readable by human eye; that would  
10 not be readable by human eye and would not be copy-  
11 rightable.

12 MR. HERSEY: As a distinction it would be,  
13 yes, when it is produced.

14 MR. MILLER: Any computer program can be  
15 read by the human eye in one of its manifestations,  
16 just as any novel that is delivered on a phonograph  
17 record or a Berlitz system of learning French, which  
18 is originally recorded and not perceptible to the  
19 eye can be made perceptible to the eye simply by  
20 printing it out.

21 MR. HERSEY: But there are some really  
22 essential differences here.

23 MR. MILLER: Between the Berlitz system  
24 of learning French and the computer program?

25 MR. HERSEY: No, the idea of having



1  
2 the copyrightable materials fixed doesn't very often  
3 apply here. Many of these programs and data bases  
4 are in constant flux. It seems to me there is an  
5 essential kind of difference between the one sort  
6 of publication and this sort.

7 MR. MILLER: We have aleatory music. We  
8 have aleatory choreography. We even have aleatory  
9 Homeric readings of literary works.

10 The improvisational arts are not terribly  
11 distinguishable/<sup>due</sup>to the constant variations.

12 MR. HERSEY: You see, you use the analogy  
13 of dramatic performance and these improvisations which  
14 are extensions of the traditional source of copyright  
15 to open the door to what seems to me to be a dif-  
16 ferent order of things.

17 MS.KARPATKIN: Why couldn't we make the  
18 distinction in the committee? For what reason?

19 MR. HERSEY: Well, because there are  
20 essential differences. A kind of shoehorn work,  
21 as I once characterized it, that is necessary to fit  
22 this thing into the kind of thinking of the copyright  
23 act is/<sup>needed.</sup>There are essential differences, but back of  
24 that and deeper than that, I speak to a cultural  
25 matter.

1  
2 I think that there is a great danger that  
3 even the utilitarian works that are protected by  
4 copyright and especially the works of art would be  
5 overwhelmed by this technology if it is admitted into  
6 the same room.

7 MS. KARPATKIN: Well, how does this affect  
8 the interest of creative workers? Are you saying that  
9 their works are going to be debased as a result?

10 MR. HERSEY: No. I have tried to put this  
11 in terms of a distinction between the individual at  
12 work and the commercial interests at work.

13 I think that what you are doing here is to  
14 equate the individual who is making his contribution  
15 in one way or another to the intellectual life of the  
16 country, and it may be humble and it may often not  
17 seem very desirable, but you are equating that contri-  
18 bution with the contribution of and the interest of  
19 very large commercial interests, and I believe that  
20 would be deleterious in the long run.

21 MS. KARPATKIN: Do you think that bringing  
22 them under the same statute in this way represents  
23 equating them? Because there are so many statutes  
24 in other ways. There are the same income tax laws  
25 and food stamp laws.

1  
2 MR. HERSEY: There are different income tax  
3 laws. We don't pay corporation income taxes. Even  
4 lamp shades are at least in a different title.

5 MR. LACY: No.

6 MR. MILLER: No. That is four lines away  
7 from 102.

8 MS. KARPATKIN: You are dealing with a  
9 different thing.

10 MR. HERSEY: I think that is a fact, and  
11 culture is a product of symbolic thinking, and this  
12 is what I am talking about. I feel that there is a  
13 danger here.

14 VICE-CHAIRMAN NIMMER: Mr. Wedgeworth.

15 MR. WEDGEWORTH: In response to that, let  
16 me just say this to John to explain what my difficulties  
17 are in coming to grips with the implications of what  
18 he is saying.

19 First of all, what would be the result of  
20 making that kind of distinction? I have problems with  
21 that, but I think I understand the difference. I  
22 understand the difference in kind, but you are clearly  
23 implying a difference in quality.

24 MR. HERSEY: No, I am not, because there  
25 is a lot of bad art.

1  
2 MR. WEDGEWORTH: Yes, and there is a lot  
3 of pedestrian writing too that you can perceive by  
4 the human eye, just as there is some very creative  
5 work that is being done in the computer field, and  
6 when you are talking about taking a shoehorn to fit  
7 the new types of works into the copyright statutes  
8 or the concepts of copyright as we have known them,  
9 it seems that you overlook that the people who wrote  
10 those laws were sort of bound by their own conception  
11 of what creativity was like.

12 I think that when I look at it in the broader  
13 context, it is impossible for me to act upon this  
14 sorting out, even though I recognize that there are  
15 differences.

16 I do see that the direct implications of  
17 doing what I think you are suggesting doing is  
18 discriminatory for a reason that I cannot justify.

19 MR. HERSEY: I don't mean to deny protection.  
20 What I am saying is that a new technology deserves a  
21 new kind of law to protect it, and I make no qualitative  
22 judgments about this.

23 I have to swallow hard often in censorship  
24 cases to defend things which I abhor, and I recognize  
25 the extraordinary contribution to our society that

1  
2 computer technology has also brought.

3 MR. WEDGEWORTH: But do you think that there  
4 should be a specific example as a direct illustration  
5 of what we are trying to say? They are all covered by  
6 the same amendments, generally speaking, of the Con-  
7 stitution, those that you think are really the higher  
8 forms of art as well as those that you have to qualify  
9 to contemplate.

10 MR. HERSEY: The sort of thing I am trying  
11 to talk about is the difference between what is  
12 recorded on acetate tapes and what is recorded or  
13 will be transmitted through tapes. We have "Gone With  
14 The Wind," "It Happened One Night," and we also have  
15 "Deep Throat." We have things which, for better or  
16 for worse, speak to one kind of human endeavor.

17 We will have all sorts of things, but among  
18 the very things we have, as has been testified here,  
19 will be parts in the telephone or the automobile,  
20 things which control the approaches of airplanes to  
21 airports. These are the range of sorts of things  
22 which computer programs deal with, which, it seems  
23 to me, are mostly directed towards commercial ends,  
24 and the things which are traditionally copyrighted  
25 mostly seem to me have to do with something different,

1 something having to do with the quality of life.  
2  
3 It seems to me that that is essentially a different  
4 thing.

5 VICE-CHAIRMAN NIMMER: Go on, Dan.

6 MR. LACY: It seems to me we are debating  
7 here probably two different questions, one, to  
8 interpret one thrust of what John is saying, which  
9 has been that copyright is a mode of protection under  
10 the law that is really appropriate only for the creative  
11 endeavors of individuals, be they well done or poorly  
12 done, and works that are produced by anonymous corporate  
13 bodies for purely commercial ends absent any element  
14 of creativity, though perhaps deserving protection they  
15 really aren't appropriate of copyright. That is  
16 the one argument and that could be applied to printed  
17 works as well as to others.

18 The second argument might be that works  
19 embodying a new technology of computer tape and  
20 chips ought not to deserve protection, but materials  
21 legible to the human eye are. These are two cross-  
22 cutting criteria.

23 I doubt that it is really in the province  
24 of this Commission to re-examine copyright policy  
25 with respect to works that don't embody the new

1  
2 technology by its very nature.

3 Let me try to illustrate what I mean by a  
4 product that happens to be something I work with, and  
5 I apologize for that, but I just happen to know it;  
6 It is a system of identifying subsequent court  
7 cases in which previous cases or statutes have been  
8 interpreted or reversed, and so on. This is produced  
9 by anonymous labor of a large corps of salaried  
10 employees who have to have a certain amount of legal  
11 training and a certain amount of intelligence and,  
12 therefore, accuracy, but certainly not requiring the  
13 creativity of innovative contributions. This is  
14 embodied in a printed product and it is copyrighted.  
15 It has been so copyrighted for approximately a century.

16 Now, when I say it is copyrighted, it isn't  
17 really the right way to protect that. It is a different  
18 thing from a novel or a symphony or a poem or a work  
19 of art, but I don't think it is really within our  
20 jurisdiction to deal with that question.

21 Then we have a second question. This  
22 particular work is one peculiarly suitable to be  
23 put in a computer based format, but one could imagine  
24 and say when it isn't printed at all and it is just  
25 going into a machine data base, it's different. I

1  
2 think we would be saying does the translation into this  
3 machine readable form mean that it should be treated  
4 differently in the copyright law, or are we saying the  
5 reason it should be treated differently is that it is  
6 a corporate product with commercial purposes in  
7 which individual creativity is notably absent? I think  
8 we have these two different questions.

9 There are certainly many printed works long  
10 entitled to copyright which no one would make a claim  
11 of individual creativity and, on the other hand, there  
12 are works embodying new technology which may indeed  
13 involve a great deal of creativity, musical compositions  
14 that are recorded only in tape and never reduced to a  
15 written score, for example, and one could draw any  
16 number of examples of that sort.

17 Are we proposing to say that only creative  
18 works of individuals, human beings writing for primarily  
19 aesthetic motivation, should receive protection, or are  
20 we saying only works in a conventional format should  
21 receive protection?

22 I think what we are doing is essentially  
23 taking a body of law developed primarily from a back-  
24 ground of older technology and seeing if they are  
25 applicable to new technologies and not fluctuating



1 the objectives of policy along the lines that Mrs.  
2 Karpatkin came up with.

3 It certainly wasn't the feeling that the  
4 data base was in and a shoehorn was then necessary to  
5 get the machinery of data bases under the 1976 statute.  
6 This I think we should simply leave alone.

7 VICE-CHAIRMAN NIMMER: May I?

8 I personally am sympathetic to the position  
9 John is reaching for. I don't think the distinction can be  
10 made  
11 /however, on the basis of machine readable or  
12 human eye readable. I don't think that will wash and  
13 I am not sure that I have any kind of suggestion.

14 MR. LACY: That is the thing that I am  
15 saying. We deal with motion picture films, which  
16 are not eye readable and a video tape which is not  
17 eye visible.

18 VICE-CHAIRMAN NIMMER: Let me try something.

19 We have been talking about creativity. I  
20 don't think creativity is necessarily the cornerstone,  
21 because the patent law requires creativity quite  
22 literally and yet we regard patents quite differently  
23 from copyright. We have the copyright and patent  
24 clause of the Constitution. There are technicalities,  
25 but it relates in substance to copyrights to authors

1  
2 and patents to inventors.

3 What we are really searching for in a way  
4 is what do we mean by authors, and maybe one approach  
5 to that is via the First Amendment. That is, under  
6 the First Amendment we all agree that authors should  
7 have free expression by virtue of the First Amendment  
8 in a way that I think, and this is all very tentative,  
9 the First Amendment is not applicable to patents or  
10 inventions as such.

11 That is, suppose there were a law making it  
12 unlawful to produce Xerox machines. I am not remotely  
13 suggesting that, but suppose there were such a law.

14 Well, that might have some implications as  
15 to the making of printing presses, but to go to some  
16 other kind of machinery that is not related to expres-  
17 sion, a law against making combustible gasoline engines,  
18 that would raise serious policy questions, and I also  
19 think it would raise First Amendment questions.

20 Similarly, if there were a machine that this  
21 law prohibited the making of and there were a wired  
22 circuit within the machine, I don't think the First  
23 Amendment issues would be raised by saying that you  
24 may not make this wire circuit, but a law prohibiting  
25 a diagram of a wire circuit would raise First Amendment

1  
2 questions.

3 I am not suggesting that the answer is  
4 absolutely clear, but I think maybe it would not.

5 Is that in a way what John is getting at?  
6 Is that computer program like the wire circuit? It  
7 is telling the machine what to do and in that sense  
8 does not raise First Amendment issues, and ergo or  
9 similarly or whatever, we are not dealing there with  
10 works of authorship in a way that we are, that you  
11 have a domain.

12 I throw that out very tentatively, but maybe  
13 that is the kind of distinction.

14 MR. DIX: Maybe I ought to ask John if this  
15 is what he is getting at.

16 To come back to your First Amendment analogy,  
17 the First Amendment has been extended to cover demonstra-  
18 tions of one sort or another on the streets. Maybe  
19 some think that that extension has gone too far.

20 If it were extended to cover this circuit  
21 kind of thing, that would be clearly, I think most  
22 of us would say here, carrying it too far.

23 Now, the pragmatic implications of carrying  
24 something too far are a weakening of the base from  
25 which you start.

1  
2 Is this what you are in a sense saying?

3 MR. HERSEY: A weakening. There is no doubt  
4 about it.

5 MR. DIX: I understand the symbolic aspects  
6 of it. I have great difficulty in finding a pragmatic  
7 damage to something that can be done by shoehorning it  
8 in.

9 MR. WEDGEWORTH: But is this greatly dis-  
10 similar, Bill, from saying we have a traditional  
11 concept of what a manuscript is and we have handled  
12 manuscripts that are very impressive where you know  
13 that here was someone who sat down and took pen in  
14 hand and drafted very laboriously whatever this was  
15 that resulted in terms of a manuscript.

16 Is that essentially different from those  
17 manuscripts where you know that the primary mode of  
18 operating for the author is to use a typewriter or to  
19 use a dictaphone? I think we have examples of this  
20 kind of accumulation of activities that are generated  
21 in different ways, but still are effectively organized,  
22 you know, under some collective term or some collective  
23 way of handling it.

24 I guess that is where my reaction comes.  
25 I feel perhaps more comfortable in looking at these

1  
2 different ways of producing human expressions, recogniz-  
3 ing that they do different things, but I don't draw  
4 the distinction there. I am not really sure, but I  
5 don't draw the distinction, and even if I tried to  
6 stretch myself to accept your conceptualization, I  
7 still don't see what the outcome would do that would  
8 make it worthwhile.

9 This is not to say that I don't recognize  
10 that it evokes different feelings for me when I look  
11 at a handwritten letter from Napoleon Bonaparte and when  
12 I see a typescript letter that came out of John F.  
13 Kennedy's office with his signature on it. It is not  
14 the same. The two documents don't evoke the same feel-  
15 ings for me, but I find it difficult to try to separate  
16 them in any effective sense other than that emotion.

17 MR. HERSEY: I think I have to speak symboli-  
18 cally, and it is inadequate to the task. I think that  
19 I worry very much about a deadening of our culture by  
20 our commercial forces now. Take the commercials on  
21 television, for example, with "Gone With The Wind"  
22 interrupted every ten minutes along the way, which  
23 is different from "Gone With The Wind" when seen on the  
24 screen.

25 What is happening to the book publishing

1 business? It seems to me to be very rough on our  
2 culture. It is getting harder and harder for a  
3 publisher to accept a book on a gamble.

4 There is an accumulation of forces now that  
5 seem to me to be pushing us towards something that I  
6 don't like.

7 I think part of the distinction that Dan  
8 made was useful and part of what worries me is the  
9 notion that very large commercial enterprises should  
10 now be embraced in the copyright law.

11 MR. LACY: No. The extent to which they're embraced.

12 MR. HERSEY: No. This is in the nature of  
13 things in terms of what we put into the computers.

14 MR. LACY: What we do on the computer based  
15 type of print is not the quantum.

16 MS. KARPATKIN: Isn't the kind of literary  
17 work that you want to protect owned by large commercial  
18 interests?

19 MR. LACY: If it is licensed, yes.

20 MR. HERSEY: It is owned by the person who  
21 wrote and he may lease it to other people.

22 MS. KARPATKIN: That is a very fine distinc-  
23 tion. Sometimes the copyright on books that we publish  
24 is transferred.

25

1  
2 MR. HERSEY: You may do that, but under the  
3 new law --

4 MS. KARPATKIN: But for all practical purposes  
5 it is in the corporation in a leasing structure.

6 MR. HERSEY: The quality of my relationship  
7 with Alfred A. Knopf has been tainted since it was  
8 bought by Random House. I don't like the idea. This  
9 is what is happening and it worries me.

10 MS. KARPATKIN: How could you say that if  
11 we implemented the kind of goal you have in mind it  
12 would make any difference to the values that we talk  
13 about?

14 MR. HERSEY: I think simply the mere fact  
15 of a separate law clearly describing the protections  
16 that are proper to the computer uses -- the mere fact  
17 of a separate law would have a cultural value, recogniz-  
18 ing that there is a difference, a real difference.  
19 That's all.

20 VICE-CHAIRMAN NIMMER: Arthur.

21 MR. MILLER: I am trying to make some sense  
22 out of this discussion of the last hour.

23 In a curious sort of way, John's argument  
24 in my mind is "bass backwards." What John really  
25 seems to be arguing for and has an emotional

1 philosophical perspective, because I agree with John  
2 more than John will ever know as an original proposi-  
3 tion on what he is saying, is that the law should  
4 recognize a scheme of protection especially for  
5 intellectually gifted or aesthetically pleasing  
6 works -- let me finish, John -- then indeed the Saul  
7 Bellow's and John Hersey's of the world should be  
8 recognized as something really apart from the manual  
9 writers and computers and the catalogers and the  
10 computer programs.

11  
12 They deserve more protection, or at least  
13 let us characterize it as protection of a different  
14 kind, than what we give the individual who is a  
15 different creator in a sense of the word.

16 If you come at it the other way that there  
17 should be a separate statute for computer software,  
18 the difficulty with that argument, and I think John  
19 has already alluded to the fact, is that there are  
20 all sorts of technologies.

21 One of the greatest evils of the 1909 Act  
22 is that it could not look fifty years into the future  
23 and see that we would have motion pictures, video,  
24 radio, satellite communications, computers and micro-  
25 films.



1  
2           You simply cannot make policy, in my judgment,  
3 on the assumption that every technology will carry its  
4 own statute. You can't do that for a variety of  
5 reasons. One is that you end up with a crazy quilt  
6 of individualized statutes that sets forth what is  
7 policy and lists what is categorized as uncertainty.

8           There is enormous uncertainty as to whether  
9 there is even a statute for the person trying to cope  
10 with somebody <sup>while</sup> looking over a smorgasbord of twenty  
11 statutes, one dealing with video tape, one dealing  
12 with computer programs, one dealing with chip technology,  
13 one dealing with <sup>laser</sup> technology, another dealing with  
14 the "aardvark" technology that none of us around the  
15 table can even perceive, but it is guaranteed to be  
16 here in spite of us, to provide categorization anarchy.

17           Second, you can't do it because there is  
18 no way in God's green earth any rational human being  
19 can expect an organization like the United States  
20 Congress to be responsive to new technologies and  
21 the need to recognize proprietary rights in them  
22 in anything even remotely resembling real time.

23           If you need any proof of that, it is the  
24 fact that we are in 1977 finally revising a 1909  
25 statute. It is unrealistic that you can make policy

1  
2 about new technology in that way.

3 Third, every time you breed categorization  
4 as recognizing individual statutes for individual  
5 technologies, or even John taking a binary approach  
6 and saying that copyright as we know it today with  
7 a "T" in a circle rather than a "P" in a circle -- I  
8 put to you the real suggestion that that is all that  
9 would be changed, the "T" for technology in a circle.

10 Once you create a situation in which you  
11 have compartmentalized, in addition to uncertainty and  
12 in addition to the inability of the law to react in  
13 real time you are breeding transaction costs, another  
14 one of the elements on Rhoda's policy analyst's list  
15 of things to be taken into account with regard to  
16 any legislative programming. You are breeding trans-  
17 action costs in terms of complying with multifaceted  
18 regulations, breeding transaction costs in trying to  
19 move rights across artificial barriers or somewhat  
20 obscure barriers, so I don't think it is realistic to  
21 go at this problem technology by technology.

22 We have already brought at least ten different  
23 technologies under the "P" in the circle. We know we  
24 have phono records, we have video tapes, we have audio  
25 tapes, we have motion pictures, and a whole variety of

1  
2 technologies, so are you suggesting to create a special  
3 statute for computer programs?

4 The difficulty with that is what we know on  
5 the basis of the testimony that already was given to  
6 us, that computer programs are not going to stay within  
7 a homogeneous technology. It has already branched into  
8 three or four different technologies, so any statute  
9 pertaining precisely to computer software is likely to  
10 ossify by the time you try it on.

11 Therefore, to the subcommittee the thinking  
12 was to try to bring software within the general  
13 philosophical framework of copyright as it exists to-  
14 day which includes compilations, collective works,  
15 digests, et cetera, et cetera, et cetera, and try to  
16 make general copyright policies operate in this field.

17 If I can try to get way back to the question  
18 you asked before and try to respond to your policy  
19 analyst's six commandments, the thinking was that if  
20 we bring software under the statute, and nothing I am  
21 going to say now is going to respond to your point  
22 that software is something that is a breed apart  
23 from literary works, as you perceive them -- at the  
24 extremes, that is clearly true. There is no way I can  
25 tell you a chip is like E. E. Cummings, but I sure will

1  
2 tell you that a computer based C.A.I. program is very,  
3 very close to most forms of instructional books I know  
4 anything about, so at the fringes they are poles apart  
5 and at the center they may be very close together.

6 Our theory was to first create a national  
7 uniform scheme. Why? To reduce uncertainty and to  
8 minimize transaction costs.

9 If you do not bring computer programs and  
10 software under a national scheme, you are in effect  
11 abandoning it to the uncertainties and idiosyncrasies,  
12 the bizarre qualities of the laws of fifty or fifty-one  
13 states -- that is anarchy -- with regard to values and  
14 rights that cross state lines, by definition we have  
15 been trying to bring it under a national scheme  
16 and unify it; and, second, bring it under the national  
17 scheme in order to reduce transaction costs, transac-  
18 tion costs created by uncertainty, transaction costs  
19 because of not being able to figure out who owns what.

20 That is why so much of that draft is devoted  
21 to the banalities of notice, deposit, registration and  
22 recordation, because when push comes to shove, the  
23 easiest way to reduce transaction costs is to create  
24 a structure so that everybody/<sup>who</sup>wants to deal with a  
25 work knows where to get it. You could not possibly

1  
2 achieve that if you abandoned the field from protection.

3 Third, bring it under a national scheme so  
4 that you could preempt state protection and eliminate  
5 the possibility that these works would be protected  
6 in perpetuity, which is worse than life plus fifty,  
7 which I think is pretty bad to begin with, but perpetuity  
8 is generally longer than life plus fifty.

9 If you left it to state protection, you would  
10 have left these works to/<sup>potentially</sup> perpetual state protection.  
11 You would also be encouraging secrecy in these works  
12 by encouraging industrial groups to operate via trade  
13 secrets and contractual terms, which would work up to  
14 be infinitely longer, which would not ventilate the  
15 work for other users to look and grow from. Therefore,  
16 bring it under the national scheme.

17 The fourth reason to bring it under the  
18 national scheme is to develop a policy that tries,  
19 fitfully to be sure, to draw the line Mel was driving  
20 at a half hour ago between the narrative quality of  
21 the work -- I won't call it literary -- but the nar-  
22 rative quality of the work and the idea or process  
23 or plan or format embodied in the work, and to try and  
24 get a uniform system, of course, to deal with that  
25 problem and keep the scope of protection under

1  
2 control, and in that process achieve another policy  
3 addressed by your policy analyst, namely, achieve  
4 some sort of balance between the user community and  
5 the developer community or the exploiter community,  
6 and try to achieve some sort of economic balance be-  
7 tween the rights of those who create the stuff and the  
8 people who use that stuff.

9 That was the thinking of the subcommittee.  
10 As much as I would like to try, I do not know what it  
11 is to say that this work is a work of UNIVAC and this  
12 is the full work of the writer. I can tell at the  
13 extremes that there is a difference between Bellow and  
14 Hersey and the New York City Telephone Book, but,  
15 by God, when you get in towards that center area you  
16 can't.

17 Forgive me, John. I am not addressing this  
18 to you. Unless one has sublime egocentric intellectual  
19 arrogance, there is no one who can draw that line be-  
20 tween work which is created and the banal mundane  
21 exploited books; and to spend time to draw that line  
22 by compartmentalized statute or differentiations of  
23 protection seems to me is increasing transaction costs,  
24 giving a burden to the federal courts that they are  
25 not capable nor competent to do.

1  
2 I don't think federal judges are better  
3 suited to determine what is a work of art or intellect  
4 than any ten people you would meet in the New York  
5 City Subway, so I just was trying to get back to some  
6 of the points you were raising before.

7 VICE-CHAIRMAN NIMMER: We are about to  
8 adjourn, but I want to take the privilege of the chair.

9 I am a very bad chairman. I do want to make  
10 a comment, if I may. Going to this distinction Arthur  
11 makes, there are a couple of points that I really want  
12 to make.

13 No. 1, on the preemption issue, that is  
14 whether there is the benefit of eliminating perpetual  
15 protection by state law, preemption can be accomplished  
16 with or without federal statutory protection for  
17 computer programs.

18 If we are in the area of federal legislation,  
19 conceivably we could recommend Congress taking a posi-  
20 tion that this is not protected by federal law, and  
21 it may not be protected by state law. That is a  
22 conceivable approach, so preemption, per se, does  
23 not require protection on a federal level.

24 Secondly, I want to remind you that we are  
25 not talking about data bases now. We are talking about

1  
2 software, so that the difficulties in distinguishing  
3 between the directory and the Saul Bellow's work is  
4 not directly analogous. You have to compare it, I  
5 think, to the instructions.

6 Finally, I want to say that the distinction  
7 that John seems to be making is that there is a kind  
8 of qualitative difference, that I think a number  
9 of us are sympathetic to, although it is very hard to  
10 get a handle on as to what it is precisely, but the  
11 conclusion you also make is, therefore, although

12 possibly there should be pro-  
13 tection for computer programs, it shouldn't be called  
14 copyright.

15 There I must say I get off the line. That  
16 to me is a very trivial distinction. That is, whether  
17 it is one statute or two statutes, whether it has one  
18 label or two labels, isn't going to make all that  
19 difference to our culture.

20 The real thrust of the question that I think  
21 is raised and I think we should face up to, and maybe  
22 this afternoon, is should there be protection for  
23 computer programs?

24 Now, we have from the copyright premise that  
25 society gains more than it loses by giving the limited



1  
2 monopoly we call copyright to works that fall within  
3 copyright. That is a kind of thing I think we are  
4 starting with, although we are not enjoined from the  
5 questioning.

6           Isn't our question if there is some qualita-  
7 tive kind of difference between the computer program  
8 and the other more conventional copyright areas really  
9 not to have a different label, but should it have  
10 protection. If it has protection, call it copyright --  
11 I don't care -- but the question is, will society gain  
12 more than it loses by giving a limited monopoly in the  
13 computer program area?

14           That to me is the fundamental question and  
15 one that we have not really squarely talked about  
16 this morning, and that I think lies to the core of  
17 what is before us.

18           Obviously, there are gains and losses by  
19 any monopoly. Do the gains exceed the losses for  
20 society in this area?

21           MR. HERSEY: No. I have to go to preside  
22 at an annual Author's Meeting this afternoon, and I  
23 can only say that what I put awkwardly I think each  
24 person around this table knows what I am trying to say  
25 and that there are difficulties here.

1  
2 I do not want to have been a part of a  
3 process that may be damaging to our culture in the  
4 long run. I don't know exactly how it would be. I  
5 have the feeling that it would be, and that is what  
6 I wanted to put out and have thought about. I do  
7 think that secretly you could feel some of this.

8 MR. MILLER: John, not secretly. I feel  
9 it very strongly.

10 MR. HERSEY: I don't want to be part of the  
11 commission of a cultural crime.

12 MR. LACY: Mr. Chairman, could I say one  
13 quick word which I wanted to reserve for the afternoon  
14 had John been here, and that would be to try to define  
15 in our own minds what kind of conclusion the Commission  
16 might hope to arrive at at the end of this two-day  
17 meeting.

18 I would assume that clearly we are not pro-  
19 posing that the Commission should adopt the recommenda-  
20 tions of the subcommittee or any amendment or change  
21 of those as its final position on the matter, or even  
22 necessarily as its tentative one.

23 It seems to me that the useful step at this  
24 stage might be to decide that these reports, amended  
25 or altered or in whatever way the Commission might

1  
2 decide, would provide a useful basis for eliciting  
3 comments of interested parties of all sorts and  
4 focusing it so we could really come to grips with  
5 the question, and I would hope at the end of the  
6 session we would reach a stage that the subcommittee  
7 report as amended and as supplemented if desirable  
8 by the views of anyone that could be appended to them  
9 would be a useful basis to send out and invite the  
10 broadest possible comment, including comments from  
11 such authors as John or anyone else, but I think we  
12 are at a stage where we need to lay something or  
13 some things on the table and ask people to say yes or  
14 no.

15 MR. MILLER: The document you have before you,  
16 so that it is specifically understood and so that it  
17 is clear, is by the subcommittee and is designed for  
18 such conversation.

19 MR. LACY: I would prefer to move the adoption  
20 of the policy recommendations.

21 MS. KARPATKIN: I have one possible considera-  
22 tion to put before John to mull over, and that is whether  
23 some of your goals can't be achieved not by focusing  
24 on amendments to the law, which is what part of our  
25 business is, but on focusing on a separate section of

1  
2 our report.

3           Apparently we have some latitude in drafting  
4 the report, and perhaps we are concerned more in  
5 principle which could be encompassed in a separate  
6 section of our report, which doesn't deal directly  
7 into statutory changes but may be in a dissemination  
8 of information.

9           MR. WEDGEWORTH: I am glad to hear you say  
10 that, because I was thinking along the same lines  
11 looking at some of the other Commission reports.

12           I think that the line of thought that you  
13 were pursuing would be a very important addition to  
14 the Commission report in a sense that it would clearly  
15 indicate that our consideration of the broader cultural  
16 question did not just sort of pass by the boards.

17           There are some serious concerns to be  
18 expressed here, but perhaps not appropriate for the  
19 staff.

20           I understand what you are saying. I don't  
21 agree with the statutes, but somehow I think it ought  
22 to be stated and the warnings ought to be sounded.

23           MR. HERSEY: I think what I am trying to  
24 reach for is some matter of substance.

25           MR. WEDGEWORTH: Well, I think in conjunction

1  
2 with that you have to go back and explore some of the  
3 points that have been raised.

4 I found that portion of the discussion as  
5 well as yours very useful this morning, but I don't  
6 think it goes far enough in terms of generating a  
7 real consensus among the members of the Commission as  
8 to what we are really setting out to do.

9 I think it would be helpful as we go through  
10 the next round of testimony to have the members of  
11 your constituency come before the Commission and try  
12 to state your views.

13 MR. LACY: I think that John's last point  
14 really raises a third distinction, and I think it is  
15 one that is much more capable of being dealt with.

16 I have emotional sympathy with the first  
17 two, but I find it difficult to be realistic about  
18 the law. One is to move sentiment where there is  
19 a difference between the anonymous non-creative, non-  
20 aesthetic labor of a compilation and generally the  
21 creative literary and musical art, but a second  
22 distinction might have been that there is a difference  
23 between materials in a visibly legible form and those  
24 that are embodied in tapes, discs, computer tapes  
25 and so on.

1  
2 I think it would be very difficult to make  
3 the law apply differently on the basis merely of a  
4 physical medium or difference basically on whether  
5 the authorship is individual and aesthetically creative  
6 or merely laborious, and equally as to whether it is  
7 the commercially motivated work of a large corporation  
8 or the creative motivated work of an individual. I  
9 think all of these distinctions should be put in the  
10 law.

11 Thirdly, a computer program, leaving data  
12 bases aside for the moment, is a new form of intellectual  
13 creation, not simply translating an existing creation  
14 into a different format. It is <sup>not like</sup> taking a printed data  
15 base and putting it on a tape. This is a new form  
16 of creation which may or may not properly and usefully  
17 be thought of as a writing.

18 That is precisely the sort of issue that  
19 the Commission can and should and must deal with,  
20 because we do have to some extent a new kind of thing,  
21 not merely a thing put into a different medium and  
22 not merely a thing of different authorship. That  
23 is a very real issue.

24 MR. HERSEY: Just one footnote to what you  
25 are saying, because Arthur was making the same kind of

1 distinction which I don't make between works which are  
2 thought to be artistic and works which are thought not  
3 to be artistic.  
4

5 To me, the gut feeling I have about this  
6 has to do with works of the mind, perceived by the  
7 mind and works of a machine perceived by a machine.  
8 That is really what the feeling is, and I see the  
9 difficulties of translating it into statutes, but  
10 there is where the trouble is.

T-5 11 M.I.T. is doing work on artificial intelli-  
12 gence now, and we will indeed have computers that are  
13 authors, and this is a world of "Clockwork Orange" that  
14 I don't want to live in. That is where the gut feeling  
15 is, and it hasn't to do with whether it is a telephone  
16 book or the Iliad.

17 VICE-CHAIRMAN NIMMER: On that we shall  
18 adjourn for lunch.

19 (At 12:10 P.M., a luncheon adjournment  
20 was taken.)  
21  
22  
23  
24  
25

AFTERNOON SESSION2:00 P.M.

VICE-CHAIRMAN NIMMER: Shall we get started?

I suppose the preliminary procedural question is have we completed our discussion of software and are we ready to go on with the next item of the agenda, or is there more to be said?

I would say we have made no firm conclusions, but I don't think that that was the intent of this particular discussion.

MR. DIX: I would like to raise one question, and this is one which was touched on earlier.

The document before us assumes that sometimes protection is necessary.

I had, before you raised the question earlier, Mr. Chairman, thought to myself that we ought to have at least a little discussion of whether any sort of protection is necessary. This is in the realm not of technicalities but of social values, I guess.

We didn't hear much argument on this point from the people that testified. They seemed to assume that any right-thinking man would think that protection was necessary, but I would just like to be convinced a little more that sometimes legal action is necessary.



1  
2 VICE-CHAIRMAN NIMMER: Well, is the emperor  
3 really wearing clothes? I think it is a legitimate  
4 question.

5 MR. LACY: Mr. Chairman, a procedural point,  
6 if I may.

7 I had suggested before we went to lunch that  
8 I would be very unhappy to see us adjourn tomorrow  
9 afternoon without having taken some action on behalf  
10 of the Commission that would lead directly to the  
11 immediate steps of circulation to all interested groups,  
12 and then to have comment on the document that expressed  
13 some view or views on these points.

14 I would feel very unhappy if we adjourned  
15 this having discussed it at certain lengths without  
16 knowing what was going to happen next.

17 Then with respect to the several reports  
18 one at a time if we dispose of them ultimately, with  
19 respect to all of them it would be my intention, unless  
20 somebody has a better idea at all, for a motion and an  
21 instruction to the staff to make a sort of examination  
22 of these reports accompanied by any comments or other  
23 views or information they may want to append.

24 I want to introduce that motion at this  
25 moment about this software report, because I feel we

1  
2 are near the end of that discussion and I think we  
3 should reach some stage of resolution.

4 Now, maybe it should go back to the sub-  
5 committee to do some further work along the lines we  
6 have discussed, but we ought not to just say we have  
7 discussed it.

8 VICE-CHAIRMAN NIMMER: Are there any other  
9 comments on what we should be doing specifically with  
10 respect to the software report?

11 MR. DIX: I certainly agree with Dan, that  
12 there ought to be an opportunity for interested parties  
13 to comment on the drafts before we take final action  
14 on them, and I would suggest that one of the methods  
15 would be a distribution to at least the people who have  
16 already testified before us and whatever other groups  
17 we can identify.

18 MR. LACY: Well, there will be an announcement  
19 in the Federal Register that they are available so that  
20 anybody can request them.

21 MR. DIX: Then the question is whether we  
22 hear further oral testimony on just the question of  
23 the timing.

24 VICE-CHAIRMAN NIMMER: That is with relation  
25 to software.

1  
2 MR. LACY: It is customary to invite written  
3 comments and to invite requests to be heard orally,  
4 which would then be decided on how substantial the  
5 written comments seemed to be or that they weren't  
6 frivolous or repetitive.

7 VICE-CHAIRMAN NIMMER: What would you think  
8 of appending to the report a transcript of this morn-  
9 ing's proceeding?

10 MR. LACY: Well, there is a practical problem  
11 about the delay in getting it and all sorts of things,  
12 such as the fact that it is a bulky and expensive  
13 document.

14 I assume the stenographer will come back with  
15 a transcript fairly promptly, but they generally need  
16 a good deal more editing not to necessarily make it  
17 more accurate, but to make it conform more closely to  
18 what the speakers wish they had said.

19 MS. KARPATKIN: Perhaps rather than that,  
20 we could have a staff summary in connection with the  
21 report and which would perhaps generate further comment.

22 VICE-CHAIRMAN NIMMER: This could be culled  
23 from the transcript.

24 MS. KARPATKIN: That's right, and that would  
25 generate further comment with respect to the additional

1  
2 questions we raise, not only this morning, but maybe  
3 this afternoon.

4 MR. LACY: And then it would go to the  
5 Commissioners before anything went out, and then if  
6 the Commissioners wanted to express an opinion and  
7 make a recommendation, we would be free to have those  
8 appended.

9 MR. WEDGEWORTH: I would feel a little un-  
10 comfortable in taking action to determine this without  
11 having had a chance to look at them. and I think we  
12 could put a kind of referral with comment back to the  
13 subcommittee for presentation at our next meeting.

14 As Arthur went through his lengthy response  
15 this morning, there were some policy considerations  
16 that were implicit in this document that he made more  
17 implicit, and I would like to see that emerge in the  
18 document itself as kind of a preamble to the material  
19 that appears here, and if we wanted to append additional  
20 matters to it, that would be okay too, but what I would  
21 like to see would be the subcommittee incorporate some  
22 of those thoughts into this document for us to consider  
23 at our next meeting and the staff to pull together  
24 whatever materials they may think appropriate to  
25 reveal the issues.

1  
2 MR. LACY: That is fine with me. That is  
3 really what I had in mind.

4 MR. WEDGEWORTH: I thought you were saying  
5 that they would go ahead and disseminate those.

6 MR. LACY: As long as there is an orderly  
7 series of steps to get something out, I have no  
8 quarrel with what the steps may be.

9 VICE-CHAIRMAN NIMMER: Did you make a motion?

10 MR. LACY: No, I didn't. I think it might  
11 well wait until we finish the discussion. I just  
12 served notice that I intended to offer a motion of  
13 that nature.

14 MR. DIX: One more point before we leave  
15 this, which we haven't, I think, touched on.

16 In this document -- this is the article  
17 by Mr. Kindermann -- the concept appears several times  
18 that one of the reasons for registering is the further  
19 dissemination of availability. In other words, it has  
20 to do with the public distribution.

21 Even though the details of the program  
22 might not be filed for various reasons, the fact  
23 that there is a program that is intended to do certain  
24 things, is a useful bit of knowledge that somehow  
25 should be disseminated.

1  
2 The concept appears here a couple of times  
3 that a central registering agency might have a role  
4 of this sort specified in the legislation itself.

5 Now, my question is simply whether this is  
6 on the one hand totally foreign to our concept of the  
7 function of the Register of Copyrights or, on the  
8 other hand, whether this is already taken care of  
9 somehow by some serial publication. I simply don't  
10 know. I am saying simply that it does seem to me that  
11 there is an essential place here for the knowledge  
12 that the various programs exist,  
13 and the question is whether then it is legitimate to  
14 impose additional / <sup>responsibilities for</sup> disseminating that information  
15 from that office.

16 VICE-CHAIRMAN NIMMER: Well, I have thought  
17 of that just in terms of the existing and new copy-  
18 right law.

19 Assume the computer program is under the  
20 general copyright -- that is the assumption, I pre-  
21 sume -- the new law like the old law does not require  
22 registration in order to obtain copyright. It does  
23 encourage registration.

24 In some ways that is not true of the old  
25 law, but unless and until you are going to sue for

1  
2 infringement, you don't have to register, so that there  
3 are those who might not be inclined to make public  
4 dissemination by registration or wouldn't necessarily  
5 do so under the new law.

6 MR. DIX: I make a parallel with a printed  
7 book. Most of them I believe are deposited. There  
8 is a depository law, and I believe they catalog a  
9 great many, but there is, through the cataloging in  
10 the Library of Congress, substantial notice of the  
11 availability of all these books, and I was trying to  
12 think of some parallel to that with relation to com-  
13 puter programs.

14 MR. FRASE: There is a register of copyright  
15 registrations.

16 VICE-CHAIRMAN NIMMER: But if the register  
17 demands registration, then you have to register it,  
18 but that is only true of published works, and computer  
19 programs may well not be published.

20 MR. LEVINE: There is also no reason why  
21 this is the direction it would go in this particular  
22 law if the law should not be amended.

23 VICE-CHAIRMAN NIMMER: Well, it could be a  
24 violation. It wouldn't be a violation as long as we  
25 don't require them to do it. It would be a violation

1  
2 of the Berne Convention, which I hope we are going to  
3 be joining.

4 MR. DIX: A version of what I was trying  
5 to say is simply that we ought to consider these  
6 variations and might give a little thought at least  
7 to the possibility of some kind of a facilitating  
8 action to transfer this knowledge from one person  
9 to another, from the copyright holder to a variety  
10 of people under our law.

11 MR. KEPLINGER: There are already a signifi-  
12 cant number of services and catalogs in the private  
13 sector that list the availability of computer programs  
14 from various sources and provide descriptions of their  
15 capabilities, so that is sort of a designation in the  
16 private sector.

17 MR. LEVINE: And this is compatible with  
18 trade secret law?

19  
20 MR. KEPLINGER: The descriptions are very,  
21 very generic, very, very basic. It is like stating  
22 that payroll programs exist and they have these  
23 characteristics, they will run on these machines and  
24 require certain minimum machine configurations to be  
25 able to use them, and a very general statement of the



1  
2 characteristics.

3 VICE-CHAIRMAN NIMMER: Well, with Dan Lacy's  
4 proposed motion in mind, we might at this point leave  
5 software, but before we do I wonder whether anyone  
6 wants to speak on the merits of what I think is the  
7 underlying point, that a monopoly, whether you call it  
8 copyright or otherwise, in this area is in the inter-  
9 ests of the American public or that its benefits out-  
10 weigh its detriments.

11 I assume that is the presumption of the whole  
12 thing, but we haven't had it expressly articulated by  
13 anyone.

14 MS. KARPATKIN: I have a question.

15 VICE-CHAIRMAN NIMMER: Yes.

16 MS. KARPATKIN: I was reviewing the compila-  
17 tion of previous testimony on the protection of  
18 computer programs, and there is a very nice chart  
19 prepared by the staff which doesn't seem to have any  
20 overwhelming demands for copyright protection from  
21 the people who testified, and I wonder if you could  
22 comment on that.

23 MR. MILLER: Well, the only comment I have  
24 is that the subcommittee in its deliberations had a  
25 rather uniform and clear perception that the weight

1  
2 of testimony we received in several meetings was in  
3 favor of copyright protection.

4 MS. KARPATKIN: You give a numerical count,  
5 and I am not suggesting that that disposes of it, but  
6 there were about eleven votes for copyright protection  
7 and sixteen votes for other kinds of protection, al-  
8 though not everybody cast just one vote.

9 MR. MILLER: Well, that's right. Also, not  
10 all votes are created equally, at least not in my mind  
11 and I don't think in the minds of the subcommittee  
12 members, and a lot of the votes that were for other  
13 forms of protection were for variations solely dis-  
14 tinguishable from copyright, as you might call them  
15 copyright, and the thing that sort of sways my judg-  
16 ment, and I emphasize the word "my," is the fact that  
17 there was a fairly uniform intention for protection.

18 There was a fairly uniform view that the  
19 availability of protection would stop a lot of "ripping  
20 off", and indeed that thought came <sup>through</sup> in the course of the  
21 subcommittee's deliberations, and focused very hard on  
22 the general policy of preventing "ripping off".

23 People said there was a lot of it. People  
24 said there was significant creativity in the compila-  
25 tion of these programs to justify it. People said

1  
2 that they could deal on a better plane of equality with  
3 users if they had it. People felt that there was a  
4 minimal risk of destroying competition so as to main-  
5 tain some reason to believe that these things would be-  
6 come available at an economically reasonable price, and,  
7 finally, I thought some very impressive testimony was  
8 given at the New York Public Library session, I forget  
9 the name of the gentleman who testified -- that the way  
10 the art of computer programming had become so sophisti-  
11 cated is that there really was minimal or no risk of  
12 blockage of assets by recognizing copyright protection  
13 in programs, that programs can become so complicated,  
14 so detailed, so really nearly narrative in their quality,  
15 that awarding a copyright under a notion that it does  
16 not embrace the idea embedded in the programs or ideas  
17 embedded in the program simply would not block other  
18 people's access to the computer programming art and  
19 the ability to use their machines for all problems.

20 I mean that is the way we dealt with the  
21 question that Mel asked, why or should there be protec-  
22 tion.

23 To be sure, we do not have an economic  
24 analysis demonstrating the difference between viability  
25 and non-viability for some socially desirable program

1  
2 that would depend on copyright protection. If we had  
3 it, it would be nice. We don't have it and I don't  
4 see any reasonable proximity when we will get it.

5 MS. KARPATKIN: How does the pricing mechanism  
6 work in the copyright protection?

7 MR. MILLER: Presumably the pricing mechanism  
8 would work as it does in any other field.

9 If somebody has a product and will price it  
10 so as to make the licensees more attracted to it, that  
11 will be it. Beyond that your respondent sayeth nothing.

12  
13 VICE-CHAIRMAN NIMMER: Any other comments?

14 MR. FRASE: One thing is the recommendation  
15 to outlaw trade secrets. I think that there is a big  
16 question as to whether that would survive the legislative  
17 process and whether people relying on that protection  
18 wouldn't come in and say, "Well, until something better  
19 is proven to us, we want to keep it."

20 Now, this may be something which would come  
21 out when this thing is circulated for comment. Anybody  
22 that felt that way would tell us in advance of telling  
23 the Congress.

24 MR. MILLER: I think politically any argu-  
25 ment for preemption in excess of that provided in 301

1  
2 limited to the software concept is in trouble, and any  
3 argument that you have to widen the breadth of preemption  
4 for computer software and not for anything else is in  
5 political trouble.

6 It may well be since 301 looks as if it had  
7 been drafted by a committee which was under the influence,  
8 that 301 already does that, and if it does, then --

9 MR. LACY: Under the influence of whom?

10 MR. MILLER: Alcohol, drugs, anything you can  
11 think of. It was not drafted by a fully sober individual.

12 VICE-CHAIRMAN NIMMER: If you add the legisla-  
13 tive history on the floor of the House, when 301 was  
14 amended it was very difficult. There was an amendment  
15 offered which was accepted, but which was interpreted  
16 by the Republican minority member of the House Sub-  
17 committee and the chairman in diametrically opposite  
18 ways. Each one said, "Under this interpretation I  
19 accept the amendment," and the amendment was passed,  
20 so we are left to guess what it means.

21 MR. LEVINE: I think when this draft is  
22 circulated, this will be the most controversial por-  
23 tion of the draft, the preemption on the copyright  
24 law.

25 MR. MEYER: I think the way it is drafted

1  
2 uses language similar to 301 in that it says the trade  
3 secret is preempted only to the extent it is designed

4  
5 to afford the same rights as those granted under the general  
6 copyright law. This is not all trade secrets, but only those  
7 trade secrets designed to serve the same purpose as copyright.

8 VICE-CHAIRMAN NIMMER: Except once you say  
9 "trade secrets," I suppose you have to have certain  
10 additional elements -- an industry or a company that  
11 uses the process but keeps it secret, which already  
12 goes beyond what you would require for copyright.

13 MR. MILLER: In any event, it will serve  
14 as a tremendous lightening of the problem.

15 VICE-CHAIRMAN NIMMER: Are there any other  
16 comments before we go on?

17 (There was no response.)

18 VICE-CHAIRMAN NIMMER: All right. Then  
19 I think we should now turn our attention to the  
20 Data Base Subcommittee Report. Dan?

21 MR. LACY: George Cary chairmanned the  
22 committee. He is absent because he is ill.

23 If you would like, I can give a brief  
24 summary, and Bob Wedgeworth, the other member of  
25 the subcommittee, can supplement what he has to say.

1  
2 VICE-CHAIRMAN NIMMER: If you would.

3 MR. LACY: In the case of data bases, I  
4 think we have an intellectually or somewhat simpler  
5 task than the subcommittee on software, since there  
6 exists a substantial body of law and practice and  
7 theory about data bases that developed over the whole  
8 history of the copyright law, of data bases in printed  
9 form, and our question was to consider how relevant  
10 they were to the problem of machine-readable data  
11 bases and what changes in the law would accommodate  
12 machine-readable data bases.

13 The copyright law has long recognized a  
14 right of compilation and a body of data, of which each in-  
15 dividual datum might well be in the public  
16 domain and where the intellectual labor and the con-  
17 tribution that was to be protected was the selection and  
18 arrangement of those data, and it made clear that the  
19 copyright in that work of selection and arrangement  
20 of compilations did not rescind the right  
21 over any individual datum unless that right was  
22 asserted on other grounds, which was a good beginning  
23 for considering machine-readable data bases. That one  
24 ought to consider them as useful compilations, which  
25 are desirable to encourage, and those who had undergone

1  
2 the labor and expense of compiling them should be  
3 protected.

4 I want to say also that it would require  
5 considerable thought to adapt the 1909 Act to machine-  
6 readable data bases, partly because they are permitted  
7 federal copyright only on publication and in part be-  
8 cause, as interpreted by the Supreme Court, it applies  
9 only to writable works; but the fact that the 1976  
10 Act extends federal copyright without a requirement  
11 of publication and without a requirement of legibility,  
12 enormously simplifies the task.

13 I think probably the difference in the  
14 machine-readable data base we need to give some atten-  
15 tion to is the fact that it is not merely selection  
16 where a selector organized the data in a particular  
17 way, but offers the possibility of selection from  
18 within that data base and reorganizing in another way  
19 as a part of the potentiality here.

20 If you have a printed dictionary, a classic  
21 example of this, the one using it can, by his own  
22 labor, extract individual words from it and re-  
23 arrange them in order of their length as the cross-  
24 word puzzle dictionary compiler might want to, whatever  
25 he chooses. The same material in the machine-readable



1  
2 data base might in the data base itself offer  
3 the potentiality of the secondary selection and second-  
4 ary rearrangement.

5 So it seemed to us that the question that  
6 arose was, if one assumed that, the same rights ought  
7 to inhere in the machine-readable data base and the  
8 printed data base, one, as to what constitutes publica-  
9 tion of a machine-readable data base, two, what is the  
10 appropriate form of deposit of a machine-readable data  
11 base, and, three, what is the status of rights in a  
12 data base consisting of subdata from the machine-  
13 readable data base that has been selected and arranged  
14 by exploitation of the potentiality.

15 It was the view of the subcommittee that a  
16 data base should be considered to have been published  
17 when it was offered for sale in a tangible form --  
18 for example, when it was offered generally for lease  
19 without restrictions on the lessee's use of it, or  
20 when it was turned over to an intermediate party, some-  
21 one like Lockheed or Systems Development for on-line  
22 access to any customer.

23 That, however, is the maintenance of the  
24 data by its proprietor offering himself on-line as  
25 such, which was not necessarily a publication, and

1  
2 with the leasing of it in tangible form the lessee  
3 could use it only under specific restrictions.

4 It seemed to the subcommittee that it would  
5 be more accurate, and to the expert advisers from the  
6 staff, that this definition of publication was con-  
7 sistent with the definition of publication in the  
8 1976 Act with the requirement as to deposit.

9 The deposit of a data base, of course, would  
10 not be required unless it were published. The deposit  
11 of a published data base, particularly if a publication  
12 of it took the form of its availability to an uncon-  
13 trolled group of subscribers and making it available  
14 to L.C. would impose some difficulty because of a  
15 constant change in the content of the data base and  
16 because of the expense and also the inutility of it  
17 to the Library of Congress where it would be deposited.

18 It was thought that this particular problem  
19 could be dealt with by administrative regulations of  
20 the copyright office until the 1976 Act goes into effect and  
21 the copyright office is authorized to accept descriptions of a work  
22 in lieu of the work itself for deposit , and permit  
23 deposits by description in the case of published  
24 machine-readable data bases.

25 Then you come to the question of the posture

1  
2 of rights and data drawn from a machine-readable data  
3 base by virtue of the machine-readable development  
4 programs.

5 Let me say also what we are trying to get  
6 to by an example. Once more I apologize for using  
7 McGraw-Hill for an example, but I happen to know  
8 the details of it.

9 Say we publish a dictionary of science and  
10 technology which has a very large number of terms  
11 using all the various sciences and major technologies  
12 with definitions. This exists in hard cover printed  
13 form. Anybody who wanted to compile from that by  
14 his own labor a dictionary of biological terms could  
15 do so.

16 If he published it, I assume he would  
17 certainly be infringing the copyright that the original  
18 proprietor holds, simply because the existing pro-  
19 prietor has a right not only in his compilation in  
20 that particular case but also in the definitions of  
21 individual data which goes to make up the data base  
22 being used; supposing one were to write a compila-  
23 tion like the one we are talking about, if one by his  
24 own labor compiled from that a list of terms applicable  
25 and beneficial to self-discipline presumably insofar as

1  
2 the right of compilation of the data base, that would  
3 be good.

4           However, if this data base is on tape,  
5 until it is printed, and it is possible to draw  
6 directly from that tape without any labor beyond  
7 reaching the decision to punch the appropriate boxes,  
8 you can get a dictionary from the data base that will  
9 be all the biological terms, and it will indeed take  
10 terms like the word "balance," which has different  
11 meanings, and they will not only select words but  
12 from a given word will select definitions.

13           It would appear in that case that the right  
14 of compilation remains with the <sup>proprietor of the</sup> / original data base,  
15 because it was indeed his labor, his program and the  
16 mode in which he had arranged and recorded that  
17 written data. It seemed to the subcommittee that a  
18 derivative data base drawn from <sup>a</sup> / machine-readable data  
19 base, by virtue of exploiting the machine-readable  
20 characteristics of the original data base, had the  
21 same proprietor as a work of compilation as did the proprietor  
22 of the original data base.

23           VICE-CHAIRMAN NIMMER: Are you saying the  
24 same proprietor or is it an infringement of the first  
25 proprietor's interests.

MR. LACY: Well, it is an infringement if it is the proprietor of the second work.

VICE-CHAIRMAN NIMMER: He may be the proprietor of the first work.

MR. LACY: There are two different questions. Let me make it clear with an example.

Take another publication called "Twenty Thousand Words." It is nothing but twenty thousand words. That is absolutely all it is, twenty thousand words arranged in alphabetical order. Such a work exists and it has been a perennial best seller. I have a copy on my desk.

Clearly, there is no proprietary interest in each individual datum; there is only such a right in the selection and production of it.

The point I was trying to make was that it is simply a copied data base, and if one wanted to go to that and select 5,000 commonly misspelled words, probably you haven't infringed on the <sup>proprietor's</sup> rights even though you have used this list for convenience. You could have used an unabridged dictionary or anything else.

VICE-CHAIRMAN NIMMER: But if you are using that "Twenty Thousand Words," those twenty thousand words are key words that might be misspelled, but now

1  
2 the second man wants to get the words that are most  
3 misspelled out of that twenty thousand, even five  
4 thousand or so, there might be an infringement.

5 MR. LACY: Let me back up. There are two  
6 sets of rights in the translation of literary  
7 works which underline rights to the original novel,  
8 let's say.

9 VICE-CHAIRMAN NIMMER: Yes.

10 MR. LACY: There is also a right in the  
11 translation.

12 If you have a copyright on your novel in  
13 the French language and I produce an English transla-  
14 tion, even though I did all the translation, I can't  
15 publish it without infringing your underlying right

16 VICE-CHAIRMAN NIMMER: On the other hand,  
17 I don't own the copyright in your country.

18 MR. LACY: So neither can publish  
19 that without joint permission.

20 VICE-CHAIRMAN NIMMER: Right.

21 MR. LACY: Now I move on to the case where  
22 the original work is in public domain. Then the  
23 translator has an undisputed right to the trans-  
24 lation.

25 Now, I was trying to set up a hypothetical

1  
2 case in which the only rights that the initial  
3 proprietor had were in the arrangement and the  
4 selection. He had no rights to the individual data  
5 that made up the data base taken separately. Some-  
6 body else rearranged those data bases.

7 Now, it may be that he infringed not the  
8 original compilation right, but there might have  
9 been some individual data, but so far as the compila-  
10 tion went the work of compiling would be that of the  
11 second compiler.

12 What we are suggesting is that the work of  
13 compilation, if the compilation is accomplished by  
14 the machine-readable characteristics of the original  
15 data base -- let me give you an example. I think a  
16 possible aspect of this is an organization like the  
17 American Chemical Society which, let's say, has a  
18 data base of many thousands of articles on chemistry  
19 which it reduced to machine-readable form which it  
20 tagged with descriptions and for which it provided  
21 the key programming for the data base.

22 If one has access and wants  
23 to draw from it an extensive list of all articles  
24 since such and such a date dealing with a particular  
25 aspect of chemistry and he comes up with a four or five

1  
2 hundred word list where his only labor has been to  
3 pose the question, the selection and organization  
4 of the output from the system has really been generated  
5 by the original labor which went into the compilation of the data base. Then I would  
6 feel that the original proprietor was the proprietor  
7 of this output list. He might have a contractual  
8 relationship with the person to/ <sup>whom</sup> he had given access

9  
10 to republish and use it and print it for his  
11 own trade, but he would have to get the permission  
12 of the original proprietor for the right to publish  
13 for that purpose.

14 I think the person who wrote this report  
15 could explain it much more plainly than I have, but  
16 I suggest you read the report.

17 MR. DIX: It doesn't seem to me to explain  
18 the most common usage of the data base and the most  
19 common area of its potential violation.

20 Let's take the fellow who writes an article  
21 and appends a bibliography. His bibliography may  
22 simply be what is in the machine that produced that  
23 data with some editing on his part, but the point is,  
24 is it a violation? Do you mean to say that anyone who  
25 uses a bibliography which he obtained from a data base  
simply as a supplement to his own article has got to



1  
2 obtain special permission or is in violation of the  
3 statute?

4 Do you see the problem? The question is  
5 "how." Suppose the data base gives him fifty bibliographic  
6 references and he decides to use thirty references. Is  
7 he in violation on the twenty he uses, or the ten or  
8 one?

9 I see a whole problem area here.

10 MR. LACY: Yes, I agree with you. I suspect  
11 it is an area that is going to have to be dealt with  
12 under a fairly new concept.

13 Now, not every use or not every copying or  
14 use of a copyrighted work without the permission of a  
15 proprietor is necessarily an infringement, and I would  
16 think that it probably ought to be held that if he  
17 appends a bibliography which is incidental to the  
18 purposes of his longer article of work, even though  
19 that bibliography was derived in whole or in part  
20 from the original service, that that is a fair use.

21 If, however, he draws off this body of data  
22 and per se offers it for sale, which is less likely to  
23 happen with a bibliographic data base, that is one  
24 thing. If you have a secondary user who has a license  
25 for on-line access to a data base and extracts a

1  
2 substantial body of material from it and publishes it  
3 without further adornment, I think he hasn't made a fair  
4 use.

5 This is the question the subcommittee went  
6 into.

7 MR. DIX: I would like to speak to that again,  
8 if I may. I don't know whether it is in legal language  
9 or not, but in one case somebody is really profiting  
10 by somebody else's work in a direct way, and in the  
11 other the bibliography is merely incidental to the  
12 original publication.

13 MR. WEDGEMORTH: Mr. Chairman, I would like  
14 to add that I, as Dan knows, entered into these  
15 discussions with a very skeptical attitude towards  
16 protection, and I think that while I am still not  
17 entirely convinced, in rereading the law I have be-  
18 come convinced that the cases about which I was most  
19 concerned can be defined under fair use, but there  
20 are some complexities to this that probably should  
21 be noted. That is in attempting to differentiate  
22 among the various types of data bases. We did start  
23 out with some precedents in terms of what had been  
24 protected under copyright law, the traditional kinds  
25 of compilation.

1  
2           What are really troublesome are the dynamic  
3 data bases which really makes this the new aspect of  
4 our work. For example, in extending protection to  
5 these dynamic data bases, you have everything from the  
6 traditional compilation of facts to those which do  
7 include the compilation of some specific formula based  
8 calculations, as well as the compilations of certain  
9 conclusions that are then made available in a dynamic  
10 data base.

11           I can see that these can be treated at  
12 different levels. For example, if there is a great  
13 deal of calculation that goes into some of the  
14 financial data bases as distinguished from simply  
15 compiling the facts of what occurred during a given  
16 point, you might want to treat them differently.

17           The other thing is that you really have a  
18 situation where there is a perpetual copyright term,  
19 because in effect, if this data base is changing every  
20 day or every week or every month, it is never quite the  
21 same so the materials will never really fall into the  
22 public domain, so it is a more complex area than  
23 appears in this particular memorandum.

24           But, as I have said, I was forced to conclude  
25 that the situations that I could think of, especially

1  
2 from my constituency, appeared to cover these, partic-  
3 ularly the one that Bill Dix was raising about how  
4 researchers would approach various data bases and  
5 what they would be able to use, but I would like to  
6 have really further assurance on those points.

7 MR. LACY: Just one other thing.

8 It seemed to us there are two things that  
9 certainly one wanted to avoid. One was any presumption  
10 that the inclusion of a datum in a copyrighted data  
11 base per se gave any right in that datum. Clearly,  
12 I think that/<sup>it</sup>does not, nor should the fact that one  
13 person has organized a body of data into a data base  
14 preclude someone else independently organizing the  
15 same or overlapping body of data into a different  
16 data base. That is, the fact that the American  
17 Chemical Society has a data base consisting of  
18 thousands of articles in the field of chemistry does  
19 not prevent the American Institute of Biological  
20 Sciences from compiling a data base of articles in  
21 the field of biology, although many of the articles  
22 would appear in both data bases. That is, the rights  
23 of the compiler of data base would be clearly confined  
24 to his labor of compilation.

25 Further, it was our view that no amendment

1  
2 of the 1976 statute was necessary in the field of  
3 data bases. That recommendation should be made to  
4 the copyright office as to the regulations on deposit-  
5 ing of the data bases, and it would be  
6 desirable to have some legislative history <sup>to</sup> /clarify  
7 some of the thoughts that we have been expressing  
8 here.

9           There is a technical problem raised of how  
10 do you get a legislative history if you are not going  
11 to have any legislation, but I think the answer to that  
12 suggested by the staff was that if there were an amend-  
13 ment of Section 117 as recommended by the Software  
14 Subcommittee, the legislative report on any bill  
15 proposing such an amendment could discourse on the  
16 whole subject of computers and copyright and express  
17 their sentiments.

18           MR. WEDGEWORTH: There is just one other  
19 point.

20           I don't want to leave any erroneous impres-  
21 sion. I want to say in coming to the discussion today  
22 I have to admit that we are probably a little more  
23 guilty than our colleagues in terms of jumping over  
24 some kinds of basic questions to get at the problems  
25 that are inherent in dealing with these different types

1  
2 of data bases, and I think it would certainly be  
3 appropriate for this subcommittee also to come back  
4 and deal with some of these more fundamental questions  
5 in a revised version of their report for presentation  
6 again to the Commission.

7 VICE-CHAIRMAN NIMMER: Arthur?

8 MR. MILLER: I seek some illumination on  
9 Part III dealing with extraction figures.

10 If I go to a library and I want to do some  
11 research on the Battle of Hastings, and I go to the  
12 encyclopedia and I turn to the index, at least to my  
13 first point of entry into the index, I might see  
14 an entry "1066," I might see an entry, "William the  
15 Conqueror," I might see an entry, "Battle of Hastings,"  
16 I might see an entry, "English History." I would  
17 then pull down the appropriate volume corresponding  
18 to the reference for each of those four references  
19 and read an encyclopedia paragraph about the Battle  
20 of Hastings written either from the perspective of the  
21 year 1066 or the biography of William the Conqueror or  
22 English History or the Battle of Hastings itself.

23 I decide that all four paragraphs are useful  
24 in my personal research and I immediately take the four  
25 volumes, no more than one page for each, and put four

1  
2 pages on a photocopying machine, not necessarily a  
3 Xerox machine --

4 MS. KARPATKIN: Capital X.

5 MR. MILLER: Right, capital X, and I walk  
6 away with four pieces of paper -- all right?

7 Let's say the encyclopedia is a data compila-  
8 tion in some time sharing system made available at  
9 my university library, and I walk in and sit down at  
10 the terminal that gives me access to that computerized  
11 data compilation and I do exactly the same thing.

12 Initially, each of those four paragraphs  
13 which have been generated either because I have  
14 looked at a display of an index comparable to the  
15 encyclopedia's index, or I have used an interactive  
16 dialogue of plugging words, 1066 and Hastings, and  
17 I have looked up four documents and I have read the  
18 same four documents on the cathode ray tube. I hit  
19 a print button and I walk away with four pieces of  
20 paper capturing those four paragraphs.

21 Is there a difference in result in what I  
22 have done under this?

23 MR. LACY: Well, I wouldn't feel that there  
24 was any essential significance beyond the labor of  
25 compilation in those four. I think that any problem

1  
2 of infringement would be one of reproducing the  
3 text, not reproducing the labor of compilation.

4 The point would be the right that the author  
5 of the article would have rather than the rights of  
6 compilation and copyright his work.

7 MR. MILLER: And it would be a fair use  
8 because I am doing this in my own personal scholarly  
9 research.

10 MR. WEDGEWORTH: That is what I thought,  
11 but I think this needs more discussion so that we  
12 can have some greater assurance among ourselves that  
13 this is in fact the thing.

14 MR. MILLER: The question I am asking is  
15 if pages 4 to 7 don't talk to that situation, I am  
16 not clear what it is talking to.

17 MS. KARPATKIN: But it does talk to that  
18 and it comes out saying that those two situations  
19 are different. That is the penultimate sentence on  
20 page 7. It says there is really a basic difference  
21 between those two systems.

22 MR. LACY: I think you could illustrate it  
23 better if what you were copying was not the Encyclopedia  
24 Britannica but was a data base of the individual items  
25 and the thing were in the public domain and that the



1  
2 copyrightable essence lay in its selection and organiza-  
3 tion, and if you do the selection and organization  
4 of the sub sets of data, or was that accomplished by  
5 the machine.

6 MR. DIX: For that you push only one button.

7 MS. KARPATKIN: But he has one encyclopedia  
8 which says, "See also," and then it lists those entries.  
9 It would not have been done by the compiler of the  
10 encyclopedia. In fact, they have it in columns where  
11 they cross-reference it neatly, so instead of having  
12 to push a button to get those things, you have to  
13 reach for the volume, and according to page 7 that  
14 is a substantial difference.

15 MR. LACY: The difference is what Arthur  
16 is extracting is not really a data base. He has four  
17 discreet items.

18 MR. MILLER: But the way the word "extract"  
19 was used in 4 through 7 --

20 MR. LACY: Well, I think "extraction" here  
21 is relating to the drawing out, not to extracting  
22 the sense of the document, but you have really pro-  
23 duced a new data base.

24 MR. MILLER: No, I have taken pieces of  
25 an existing data base, and the question is are those

1  
2 pieces fair use.

3 MR. LACY: That is not really what we were  
4 talking about. What we were talking about was/<sup>whether</sup>making  
5 a new data base from the old data base/<sup>was</sup>a new work of  
6 compilation.

7 MR. MILLER: That is, the user is making a  
8 new work of compilation over preselected data.

9 MR. LACY: You know, the new data base is  
10 a new list. Somebody presumably has a copyright in  
11 that new data base.

12 MR. MILLER: But the Encyclopedia Britannica  
13 has a copyright in that data base.

14 MR. LACY: Well, it has a copyright in the  
15 words in that data base because of the fact that it  
16 wrote them, which is a different copyright than over  
17 the arrangement of those data bases.

18 If what you had here was a collection of  
19 clippings from early 19th Century newspapers that  
20 somebody had gone through and clipped all the articles  
21 out of --

22 MR. MILLER: All right, let's suppose there  
23 were newspaper articles. Let's take the New York  
24 Times, to use the world's most arrogant publication  
25 that I think exists.

1  
2 I would sit down at the New York Times  
3 information service and I would say, "Give me what  
4 you have on the Battle of Hastings." He introduces  
5 fifteen newspaper clippings. Am I now an infringer?

6 MR. LACY: Well, you are certainly not an  
7 infringer in having gotten that out. You paid a fee  
8 to do that.

9 Again, I think the essence is, assuming each  
10 one of those documents is in the public domain, the  
11 only right the New York Times is claiming is the fact  
12 that it selected this body of documents and arranged  
13 them in this way.

14 Now, if what you are publishing is what you  
15 are claiming, a copyright and a selection and arrange-  
16 ment of a particular body of documents, this might  
17 be quite possible.

18 Supposing what you were to publish was a  
19 documentary history of the Spanish American War and  
20 you had extracted from the New York Times data base  
21 that went as far back as 1898 all of the articles that  
22 they had dealing with the Spanish American War and  
23 you published this as a work.

24 Well, you really contributed nothing to it  
25 except to pulling it out. What you do have as to these

1  
2 documents and not others is that the New York Times  
3 selected them and put them in this data base and it  
4 has made that data base such that you are posing a  
5 query to it in a given way which produced these things  
6 for you.

7 MR. DIX: Take, for example, something that  
8 is not copyrighted. We will take the percentage tables,  
9 and you ask the machine then to give you the numbers of  
10 girls between 18 and 21 with red hair in this town in  
11 Alabama. It is a combination of those things that pro-  
12 duces the added factor, isn't it, which your report  
13 says is presumably copyrightable?

14 MR. WEDGEWORTH: It really says the opposite,  
15 and this is the part where, you know, we have talked  
16 about this a lot, but we just never came to an agreement.

17 I think that we would all agree that the first  
18 part of our inputting was one in which we all agreed  
19 with respect to the data bases. This extraction ques-  
20 tion is really quite difficult, because in my mind I  
21 can't draw that distinction.

22 If you look on page 7, you get to the final  
23 point in that particular section which says that when  
24 you are looking at this interactive data base, the  
25 thing that is being protected is almost exclusively

1  
2 attributable to the creator of the data base.

3 Now, the point that I would make is that we  
4 are constantly faced with situations where the user  
5 comes to a data base and applies much more ingenuity  
6 to the extraction of material from that data base than  
7 the data base proprietor ever thought of, and the  
8 result of that is that I don't think that that con-  
9 tention is supportable, which is why I think that that  
10 section on extraction is much more difficult to deal  
11 with.

12 It seemed to me that it would be easier just  
13 to rely on the section on derivative works where you  
14 would have to go to the distinction among data bases,  
15 where the people could show that someone wholesale  
16 listed parts from a copyrighted data base whereas  
17 there were sub compilations of data that were used  
18 or where there were conclusions that were included  
19 in the data base and that were subsequently used in  
20 a derivative work, and therefore, you could establish  
21 the basis for infringement, but simply on the basis  
22 of how the user uses the data base is very different  
23 from this.

24 MR. MILLER: You know, I think it is useful  
25 to start talking about illustrations of what 4 through

1  
2 7 talk about.

3 Take this, for example. Take the data that  
4 the computer has done. It has taken the census data  
5 tract by tract and all the compiler has done is take  
6 the alpha numeric data and put it into a machine.

7 The most you could say about that individual  
8 is that that individual is a translator, not a com-  
9 piler. The compilation existed. All that individual  
10 did was translate the compilation from alpha numerics  
11 to machine-readable form.

12 Then that translator attaches a very  
13 sophisticated based manipulation system on that and  
14 so that I would use it and say I want the number of  
15 redheaded women between the ages of 22 and 25 in any  
16 town of Alabama having a population of more than 600;  
17 right?

18 Now, if I do that without a license, what  
19 have I done? I haven't infringed the data base, the  
20 original census data base. The data base proprietor  
21 hasn't done a thing to that data base.

22 Maybe if that data base proprietor took  
23 census plus economic forecasting plus New York Times  
24 plus Lockheed, plus X, Y, and Z, and put it together,  
25 and when I made my request, my request went through

1  
2 eighteen different independent and selected and compiled  
3 data bases, that would be one thing, but if all my  
4 request is to go to one data base which the data base  
5 proprietor simply translated, the most I have done is  
6 infringed the translation right.

7 MR. DIX: Of his program.

8 MR. MILLER: It is the data base but not in  
9 its alpha numeric form. It is the data base in a  
10 machine-readable form, which I think is a derivative  
11 work under the statute and, ironically, I also haven't  
12 infringed on the program because it is not the data  
13 base that controls the manipulation and extraction,  
14 but it is the program that controls the manipulation  
15 and extraction.

16 So I guess all I am saying is that as you  
17 begin to look at other illustrations of what could  
18 happen with utilization of data bases  
19 it does become multifaceted.

20 MR. LACY: That illustration doesn't illus-  
21 trate our question, though, because it assumes that  
22 there is no right of compilation in the existing main  
23 data base.

24 MR. MILLER: I am talking about a public  
25 domain data base in which all the proprietor does is

1  
2 translate it into a machine usable form. It may be  
3 an infringing act for me to come along and take it.

4 MR. LACY: It is not an infringement of a  
5 right of compilation, but to take an example that is  
6 closely related to yours, and there is a real life  
7 example of this kind, not something that I dealt with.  
8 The census tract data was made with economic data  
9 arrived at from a number of other sources. There was  
10 an inquiry such as "Give me the 500 census tracts in  
11 the United States with the highest per capita income,"  
12 or you could get much more complicated than that and  
13 say, "The highest percentage of registration of  
14 Cadillac automobiles," for example.

15 You have got a new data base. You have got  
16 a data base that consists of several hundred census  
17 tracts. Somebody is compiling this subsidiary data  
18 base, and the query is, whose is it? Did I who ask  
19 the question compile it or did the computer do it?

20 Now, there would be no question that if  
21 I wrote a letter to the proprietor of this data base  
22 and said, "Please give me a list of the 500 counties..."  
23 and he punched the computer himself and wrote me a  
24 letter back saying, "Here are the 500." There would  
25 be no question that he would be the proprietor of that



1  
2 list of 500. He might license me to use the information  
3 that he had given me.

4 MR. WEDGEWORTH: But even there it really  
5 depends on what the derivative work actually is. If  
6 all the derivative work is is a compilation of those  
7 conclusions that come from that data base, I think  
8 that there is a real argument to be imposed for in-  
9 fringement there, but if the person requiring that  
10 data base got that information and then added some  
11 more energy and intellect to that data in order to  
12 produce another work, I think that is something else  
13 again.

14 You can't answer those questions.

15 MR. LACY: In fact, this is what we  
16 recommended -- to rely on the law as it now stands  
17 on this. We are talking about what I think might be  
18 in some legislative history.

19 VICE-CHAIRMAN NIMMER: I would like to get  
20 into this if I may. I feel handicapped because I have  
21 not read the report and because I didn't get it before  
22 we came to this meeting, but I have a couple of points.

23 First of all, I am not sure with respect to  
24 derivative works. Whether or not the derivative work  
25 is an infringement of the underlying work is, of course,

1  
2 a completely different question than whether or  
3 not the creator of a derivative work has himself  
4 added other written material and claimed copyright  
5 from that, so that the issue of creativity of the  
6 derivative workman doesn't enter the question of  
7 whether he is infringing the underlying work.

8 It turns on what he has taken regardless of  
9 what he has added by way of his own creativity in  
10 determining the infringement question.

11 MR. LACY: This one paragraph is an effort  
12 to deal with that question there.

13 VICE-CHAIRMAN NIMMER: Page 7?

14 MR. LACY: Yes.

15 VICE-CHAIRMAN NIMMER: What makes the  
16 extract of the interactive data base different from  
17 traditional extracts is that it is almost exclusively  
18 the creativity of the data base proprietor which leads  
19 to the creation of the interactive extract.

20 I am not sure what that means.

21 MR. WEDGEWORTH: What I am saying is only  
22 under certain circumstances.

23 VICE-CHAIRMAN NIMMER: I mean "assuming it,"  
24 and then it goes on to say, "This means that the copy-  
25 right in the extract should belong to the owner of

1  
2 copyright in the data base rather than the user" --  
3 that bothers me. That is certainly not traditional  
4 copyright law.

5 At any rate, I want to study that further.

6 Let me go back to a point, though, that you  
7 made, namely, that no change in the law is necessary.  
8 Well, I query that.

9 Assuming we follow your conclusions. Read-  
10 ing Section 117, Section 117 can be read to say that  
11 the law under the 1976 Act vis-a-vis computers includ-  
12 ing data bases is whatever the law was before the  
13 1976 Act, under the 1909 Act and if under the 1909 Act,  
14 as you suggested, Dan, as to data bases you would have  
15 trouble with a copyright apart from the question of  
16 publication, because they were not visible to the  
17 naked eye of Congress, then even though that definition  
18 of copyright changes under the new law, it is arguable  
19 that for these purposes the old law, not the new law  
20 applies unless 117 is amended.

21 MR. LACY: Well, I have two points on that.  
22 One is that 117 is not quite that sweeping.

23 VICE-CHAIRMAN NIMMER: I am saying that  
24 it is arguable.

25 MR. LACY: But, in any event, more to the

1  
2 point, we were assuming that 117 all along had been in-  
3 tended to lie in the statute only to the moment that  
4 the Congress adopted the recommendations of the Com-  
5 mission for a stop gap provision.

6 VICE-CHAIRMAN NIMMER: Right, but I thought  
7 you said our recommendation would be that there would  
8 be no change in the law.

9 MR. LACY: Well, assuming that the aspects  
10 of 117 continued in effect, the 1909 Law would have  
11 been dissipated by whatever amendment was done in  
12 connection with the software report, and it certainly  
13 is true that you would have to get rid of the perpetua-  
14 tion of 1909 aspects of 117, but as to that the rest  
15 of the 1976 statute, it seemed to us, did not apply.

16 VICE-CHAIRMAN NIMMER: At the reporter's  
17 request, we will take a ten minute break.

18 (After a short recess.)

19 VICE-CHAIRMAN NIMMER: All right, let's  
20 go ahead.

21 There is an ongoing symposium on the new  
22 copyright law being held in this city, and Arthur  
23 Miller is going to be giving his contribution to it  
24 at about 4:15. We have all been invited to attend  
25 if we are of a mind to, and I thought it might be

1  
2 appropriate if the Commission is willing for us to  
3 adjourn, say, at 4:00 o'clock in order to get over  
4 there, which is just a few blocks away, in the New  
5 York Hilton.

6 Do I hear any objections to that procedure?

7 MR. LEVINE: I don't know the room, but it  
8 will be posted, I am sure, in the lobby.

9 MS. KARPATKIN: Do we have to pay?

10 VICE-CHAIRMAN NIMMER: No.

11 All right, let's continue the discussion then.  
12 We are still on data bases.

13 MR. WEDGEWORTH: Let me bring up the question,  
14 and I think that at our last subcommittee meeting the  
15 discussion was very lively and I am pleased with the  
16 way it came out.

17 I think the question that comes up for me  
18 in Part III is whether it is really necessary and  
19 I would address this to Dan and other members of the  
20 Commission in terms of their thought.

21 What would be lost if we didn't have that  
22 section?

23 MR. LACY: Nothing, except to explain why  
24 we did not feel it was necessary to amend the law  
25 on this point, and perhaps to provide a gloss on what

1  
2 the definition of "subsidiary derivative work" means  
3 when applied to this sort of thing.

4 MR. WEDGEWORTH: Okay.

5 VICE-CHAIRMAN NIMMER: Could somebody sum  
6 up the position of the subcommittee on input as  
7 distinguished from printout?

8 MR. LACY: Well, it was stated in the  
9 report.

10 MR. WEDGEWORTH: Page 4 is the summary, Dan.

11 Generally, the subcommittee felt that the  
12 input was the more critical area to control and there  
13 was general agreement that the inputting of this  
14 material constituted an infringement unless at least  
15 one of the four conditions that are listed on page 4  
16 obtained.

17 MR. LACY: I can read from the third paragraph  
18 under II.

19 "Sections 101 and 106," meaning of the 1976  
20 Act, "give the copyright owner the exclusive right  
21 to reproduce or authorize the reproduction of his  
22 work in material objects in which that work is fixed  
23 and from which it can be reproduced. Thus the inputting  
24 of copyrighted material seems clearly to amount to  
25 reproduction, which the copyright owner is exclusively

1  
2 entitled to do or authorize."

3 Beyond that there were some examples on  
4 page 3 that suggested that the input of the work,  
5 though a use which is among the exclusive rights  
6 of the author is not excluded from the application  
7 of the doctrine of fair use, and there might be input  
8 that were fair use such as there might be copies or  
9 any other use that would be an infringement

10 VICE-CHAIRMAN NIMMER: I think that is  
11 subject to the point I made about Section 117.

12 MR. LACY: We were more explicit about  
13 117. The recent provisions of the new law if the  
14 present 117 were deleted would provide the necessary  
15 material, so we did recognize that 117 would have  
16 to be out.

17 VICE-CHAIRMAN NIMMER: Any other comments?

18 (There was no response.)

19 VICE-CHAIRMAN NIMMER: All right. Then I  
20 think we will leave that where it is and go on with  
21 the next item on the agenda, which is the Report  
22 on National Information Policy. Arthur?

23 MR. WEDGEWORTH: That is the memo; that is  
24 not the agenda.

25 VICE-CHAIRMAN NIMMER: Will somebody give

1  
2 me the agenda, please?

3 MR. WEDGEWORTH: Photocopying.

4 VICE-CHAIRMAN NIMMER: We plan to do that  
5 tomorrow morning, so perhaps we have covered it for  
6 today.

7 MR. WEDGEWORTH: Shouldn't we come back to  
8 that question that you raised earlier this afternoon  
9 about taking action to move the subcommittee reports  
10 forward by making the appropriate revisions based  
11 on our discussions today and bringing them back  
12 before the Commission at our next meeting?

13 VICE-CHAIRMAN NIMMER: There is nothing  
14 comparable in the photocopy written report that would  
15 apply, is there?

16 MR. LACY: Well, I was trying to get the  
17 exact words of a motion. Let me see if I understand  
18 what I had the feeling the concensus was about this this  
19 morning.

20 It seemed to me we were saying that it would  
21 be appropriate for these reports to be remanded to the  
22 staff and the subcommittee at this stage to be revised  
23 and supplemented in the light of the discussion. That  
24 is No. 1.

25 No. 2, the staff would prepare a summary of



1  
2 the main points and questions raised in the discussion  
3 and the different views; that these two documents, the  
4 revised report and the summary of discussion, would  
5 then be circulated to each member of the Commission  
6 and then the Commissioners could then prepare supple-  
7 mental or additional views or dissenting views or  
8 alternative views or whatever.

9           Probably this will take all the time between  
10 now and the next meeting, and one would assume that  
11 the staff could have ready for the next meeting of the  
12 Commission these revised reports with any supplemental  
13 or minority or other views of the Commissioners there,  
14 and if that were acceptably done and accepted by the  
15 Commission, the Commission would then at the next  
16 meeting authorize the staff to make these available  
17 to all interested parties requesting their comments  
18 on them and asking those parties if in addition to  
19 their main written comments, they wanted to be heard  
20 in oral testimony, and then to select from those or  
21 recommend to the Commission the selection of those  
22 who seem to be worthwhile hearing further orally.

23           If that is the consensus, I am prepared to  
24 so move.

25           MR. WEDGEWORTH: Dan, I am sorry. I missed

1  
2 the beginning of that last part.

3 You are saying that that is the ultimate  
4 objective to complete these reports and any supple-  
5 mental documentation and to make them available to  
6 interested parties so that they might be --

7 MR. LACY: So that at the next meeting, if it  
8 is approved, approvment in the sense of approving  
9 dissemination with comments making it clear that these  
10 were not actions of the Commission but that these  
11 were the discussion points that they wanted to get  
12 comments on, we would then send them out after the  
13 next meeting and invite any witnesses or send them  
14 to anybody we have reason to believe would be inter-  
15 ested and then we would invite those comments.

16 VICE-CHAIRMAN NIMMER: I take it to be  
17 clear that these are reports of the subcommittees  
18 which have been considered by the Commission, but  
19 there has been no approval, even tentative approval  
20 by the Commission.

21 MR. LACY: Yes, precisely.

22 MR. WEDGEWORTH: I would second that motion.

23 I took down the points if you want them  
24 reviewed distinctly.

25 VICE-CHAIRMAN NIMMER: All right, that might

1  
2 be useful.

3 MR. WEDGEWORTH: The action would be to  
4 remand the report to the Commission staff and the  
5 respective subcommittees to be revised in light of  
6 the discussion; that staff will prepare compilations  
7 of the major issues related to each of the subcommittee  
8 reports; that Commissioner dissenting views and other  
9 comments would be elicited; and that the staff would  
10 distribute all of this for our next meeting.

11 MS. KARPATKIN: Is there a timetable? The  
12 next meeting is very soon, isn't it?

13 MR. LEVINE: That is true.

14 MR. LACY: I don't think that there is  
15 very extensive revision necessary.

16 MR. WEDGEWORTH: We might have difficulty  
17 getting all of the comments in by then, but I think  
18 it is more important to get the basic documents  
19 revised and the staff work accomplished compiling  
20 the major issues.

21 MS. KARPATKIN: What would happen at the  
22 next meeting?

23 MR. LACY: Then the Commission would hopefully  
24 not approve the documents but approve sending these  
25 documents after the operations on them that we have

1  
2 just described to all interested parties.

3 VICE-CHAIRMAN NIMMER: Your motion is to do  
4 that now so that it doesn't have to come back to us,  
5 obviously? We are approving now the sending them out?

T-8 6 MR. LACY: No, I wouldn't say we are. We  
7 are announcing an intention to send them out if we  
8 approve the state in which they have been brought at  
9 the next meeting.

10 VICE-CHAIRMAN NIMMER: I see.

11 MR. WEDGEWORTH: We are saying at the next  
12 meeting after having seen the revised subcommittee  
13 reports and any supplemental documentation, they  
14 would be approved for dissemination to the interested  
15 parties.

16 MR. LACY: You know, if we weren't going to  
17 meet for two or three months, I would say dissemination  
18 anyway, but since it will be a tight squeak to get  
19 them ready for the next meeting anyway, there would  
20 be no delay involved in letting us look at it at the  
21 next meeting.

22 VICE-CHAIRMAN NIMMER: That will give some  
23 of our Commissioners a chance to comment.

24 MR. DIX: That applies only to the first  
25 two reports?

1  
2 MR. WEDGEWORTH: Yes, but we will have  
3 other business too.

4 VICE-CHAIRMAN NIMMER: All right. You have  
5 heard the motion and the second. Are you prepared  
6 to vote?

7 All in favor of the motion, raise your hands.

8 (There was a show of hands.)

9 VICE-CHAIRMAN NIMMER: Opposed?

10 (There was no response.)

11 VICE-CHAIRMAN NIMMER: Passed.

12 MS. KARPATKIN: We will then get an economic  
13 analysis on which our reports will be based?

14 MR. WEDGEWORTH: Is that a statement or a  
15 question?

16 MS. KARPATKIN: Question mark.

17 MR. LEVINE: After we submit our draft  
18 subcommittee reports we will be getting the economic  
19 analysis, and the economic analysis can be another  
20 factor in determining what the final report will  
21 be.

22 VICE-CHAIRMAN NIMMER: We are not approving  
23 the report even tentatively. We are simply acknowledg-  
24 ing receipt of the reports and passing them on for  
25 further comment.

1  
2 MR. WEDGEWORTH: That will give us something  
3 to do while these papers are out on the street.

4 VICE-CHAIRMAN NIMMER: The Director has  
5 several announcements.

6 MR. LEVINE: Just two very brief ones.

7 The first one is that Barbara Ringer hoped  
8 to be here, but she could not make it.

9 The second is that I thought that I would  
10 bring you up to date on the extension.

11 Right immediately after the last meeting,  
12 Judge Fuld wrote to Congressmen Kastenmeier / Rodino, and Senators  
13 McClellan and Eastland requesting an extension.

14 I have talked informally to the subcommittee  
15 counsel both on the Senate side and the House side,  
16 as I think I reported earlier, and the Senate sub-  
17 committee wants the House to act first and the House  
18 intends to act first, but I have seen precious little  
19 action except that last Friday Chairman Kastenmeier,  
20 in handling the hearings on agencies within his  
21 jurisdiction, had the general counsel of the copyright  
22 office there and he asked Jon Baumgarten, "Do you know  
23 about this request for an extension," and he said,  
24 "Yes."

25 He said, "Well, this is the second extension

1  
2 they have asked for and they had better have some  
3 pretty good reason for wanting a second extension."

4 Jon said, "Why, Mr. Chairman, this is  
5 the first."

6 "No, it is the second, isn't it," and he  
7 turned to counsel and counsel shook his head. This  
8 is distressing.

9 MR. FRASE: Nodding his head.

10 MR. LEVINE: Nodding his head. I'm sorry.  
11 He nodded his head.

12 I think that what this reflects is that  
13 in our original bill, authorization for appropriations  
14 only extended to June 30, 1976, and we had to go back  
15 for further authorization for appropriations, and  
16 there were hearings and I testified and there was a  
17 continued authorization for appropriations, and I  
18 think he is confused.

19 I spoke to him on the phone immediately  
20 after that and wrote him a letter with supporting  
21 documentation to straighten out this confusion,  
22 and I don't know if anyone has spoken to him, but  
23 I would hope that you could write directly to Congress-  
24 man Kastenmeier so that this can be straightened out,  
25 Mel.

1  
2 VICE-CHAIRMAN NIMMER: As far as the factual  
3 situation, it is a fact?

4 MR. LEVINE: Counsel straightened it out,  
5 but we can talk about that, so that is the status of  
6 it.

7 VICE-CHAIRMAN NIMMER: All right. Anything  
8 else?

9 (There was no response.)

10 VICE-CHAIRMAN NIMMER: What time do we  
11 meet tomorrow morning?

12 MR. WEDGEWORTH: 9:30.

13 VICE-CHAIRMAN NIMMER: All right, we will  
14 adjourn until 9:30 tomorrow morning.

15  
16 (Whereupon, at 3:45 P.M., an adjourn-  
17 ment was taken.)  
18

19 - - -  
20  
21  
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25



February 25, 1977

9:30 A.M.

VICE-CHAIRMAN NIMMER: Shall we get started?

First, as to our procedure this morning, I think we should certainly be through by noon and quite possibly before then.

On the agenda is the discussion of the photocopy issue and then an open discussion for anything that anybody wants to raise.

First, as to the photocopy issue, as Chairman of the Photocopy Subcommittee, I am going to give a rather brief form report which I hope will be supplemented by Alice, John and Bob, to the extent they are moved to do so.

We do not have a formal written report to offer to you as did the other two subcommittees. Our reason -- I don't say excuse, but reason -- is we were later in getting into this by the Commission's decision that the other matters were to be handled first, and of course, the Commission as such did get into it in a sense in the whole guidelines picture, but now we are trying to look at ultimate solutions and it is in that context that I want to make a report.

The nature of the report should be to put

1  
2 before you factually what has been happening, and  
3 analytically the kinds of issues that we are concerned  
4 with, and then perhaps it can be followed by a sub-  
5 stantive discussion by the Commissioners as to how  
6 each of you feel about these issues, which will  
7 certainly give some guidelines to the subcommittee  
8 and help all of us in trying to formulate our views  
9 in this difficult area.

10 First, as sort of a preliminary matter having  
11 to do with Irwin Karp's testimony, you recall at our  
12 last meeting, Mr. Karp appeared before us and addressed  
13 certain questions to the Commission as to what our  
14 intentions were in the photocopy area.

15 I think the Commissioners don't have a copy  
16 of the questions --

17 MR. FRASE: They do.

18 VICE-CHAIRMAN NIMMER: Then you have that  
19 and you saw what the questions are. They have to do  
20 with filling in in guideline terms certain areas that  
21 were not made specific under the guidelines that are  
22 generally covered by the statute, the new statute,  
23 but that are not interpreted by guidelines, asking us  
24 whether we intend to go into those areas and supplement  
25 the guidelines or suggest supplemented guidelines.

1  
2           The subcommittee in meeting yesterday con-  
3 cluded, subject to your approval, to reply to Mr. Karp  
4 as follows, in effect: That at this point we are not  
5 prepared to go forward affirmatively in resolving such  
6 guidelines and that it is our suggestion that if his  
7 organization and other interested parties wished to do  
8 them, then they should themselves meet and see if they  
9 can evolve guidelines and we would be interested in  
10 hearing what they have to say and whether they are  
11 able to reach any accommodation, reserving to ourselves  
12 the later decision as to whether we want to get into  
13 the further supplementing guideline area or not, but  
14 at this point we suggested that we are not prepared  
15 to go forward now, and we think that if anyone wishes  
16 to, then they should meet among themselves.

17           I have stated that very loosely, but that  
18 is the idea.

19           In a moment I will explain why it may be  
20 that the guidelines will not be a relevant matter  
21 ultimately, at least in my view, and why I think  
22 we all agree it is premature -- that is, all of the  
23 subcommittee agrees it is premature to get into that  
24 issue.

25           Perhaps I should pause on that point and ask

1  
2 for the views of the Committee on whether this reply  
3 to Mr. Karp is satisfactory. Do I hear any objection?

4 MR. FRASE: Mel, I think it might be useful  
5 to indicate that in the subcommittee discussion one  
6 of the matters that was discussed was the fact that  
7 on the first three of these Karp guidelines there will  
8 be some new data coming in from the King Study, and  
9 particularly on the matter of <sup>the</sup> incidence of library  
10 loans for articles more than five years old and some-  
11 thing also on in-house reproduction, so that I think  
12 both the parties and ourselves will probably benefit  
13 by having these additional facts and information.

14 MS. WILCOX: I think what also should be  
15 mentioned is that the subcommittee felt that it was  
16 important that you should suggest that we are not  
17 prepared to go forward at this time, that we are not  
18 taking a position, but we are reserving any position  
19 as to whether any additional guidelines should be  
20 established.

21 VICE-CHAIRMAN NIMMER: Yes. That is up  
22 to them if they wish to go forward.

23 Hearing no objection, I assume the Commission  
24 agrees to that response?

25 MR. WEDGEWORTH: I don't have an objection,

1  
2 but I would simply raise a question about the latter  
3 part of the statement.

4 I don't see that it is necessary to tell  
5 these parties what they can do on their own since  
6 they are very well aware of that, and I think that  
7 might tend to put the Commission in a position that  
8 could vary with the position I think the subcommittee  
9 has taken.

10 VICE-CHAIRMAN NIMMER: You mean by the mere  
11 fact that suggesting a possibility implies that we  
12 wish they would do that?

13 MR. WEDGEWORTH: Well, not necessarily, but  
14 that you might hint it may be necessary to have further  
15 guidelines, and I think that in the first part of your  
16 statement you have indicated that you are not prepared  
17 to do anything at this point or that we are not pre-  
18 pared to do anything at this point.

19 VICE-CHAIRMAN NIMMER: Yes.

20 MR. WEDGEWORTH: And I would simply end the  
21 statement with that.

22 VICE-CHAIRMAN NIMMER: How do the rest of  
23 you feel about that?

24 MR. LACY: He hasn't asked whether they  
25 should or not. He simply asked us to do it and we

1  
2 have answered the question.

3 VICE-CHAIRMAN NIMMER: I gather there is  
4 general accord with that view.

5 All right. Hearing no objection to that,  
6 we will do it that way.

7 Going on to more substantive aspects, there  
8 is the <sup>interim report on the</sup> King Study. Has the Commission received copies  
9 of that?

10 MR. FRASE: No, they haven't.

11 VICE-CHAIRMAN NIMMER: You will be receiving  
12 that.

13 You recall there is a King Study which we  
14 are in part underwriting and we have received a  
15 progress report and analysis of what they are doing,  
16 which I personally found most encouraging.

17 "Interim Report: Analysis of Library Photo-  
18 copy and Feasibility Tests of Proposed Royalty Payment  
19 Mechanisms and MINITEX Data Analysis," which was  
20 funded by the NCLIS, the National Science Foundation  
21 and CONTU. The report is dated January 28th of 1977.

22 You will be getting copies of it and I will  
23 not therefore attempt to summarize it, but I think  
24 the most interesting part and the most significant  
25 part is Part III, the analysis of the approach they

1  
2 intend to take on their proposed royalty payment  
3 mechanism.

4 They are charged with looking into the  
5 possibility of looking into a royalty payment mechanism  
6 which they call "RPM," and they go into that whole  
7 project in some length, which you will see.

8 Among other things, they state certain un-  
9 certainties as to the application of the guidelines  
10 which become relevant in connection with their  
11 royalty payment mechanisms -- that is, in order to  
12 know whether a royalty is due with respect to a given  
13 act of photo reproduction, they felt it is necessary  
14 to know what the guidelines say are free and what are  
15 not, and, hence, certain ambiguities arise, they find,  
16 and they state those ambiguities.

17 I don't know whether we want to go into  
18 that now or not. We can momentarily, if you wish,  
19 but I thought I would sort of take you in very broad  
20 strokes where I feel we are going and what the options  
21 may be, and then I hope very much the other members  
22 of the subcommittee and our staff member, Bob Frase,  
23 will supplement, contradict or otherwise come in.

24 Basically, when we are talking about a  
25 royalty payment mechanism, we are talking about

1 counting, counting when there is photo reproduction,  
2 and further possibly, although not necessarily,  
3 determining what is being reproduced -- that is, who  
4 the author is and what the work is and keeping track  
5 of that, so that, of course, brings up first mechanical  
6 and administrative questions of how you do it and  
7 how you do it with the least burden to the libraries  
8 or whoever is doing it and how you do it with the  
9 least cost to whoever is involved, and at the same  
10 time maximizing the information and the security in  
11 which it will be done.

12 One of the possible ways, obviously, and  
13 something we have talked about in the past is coding  
14 on the works to be reproduced, having a coding mechanism  
15 similar to that that is beginning to be used in grocery  
16 stores.

17 That in turn raises a question of if coding  
18 is to be done, there are several questions, No. 1 being  
19 that if it is to be done voluntarily or by law.

20 Well, that is a sub question of the broader  
21 question, is the whole royalty mechanism to be done  
22 voluntarily, by voluntary groups, or is it to be kind  
23 of compulsory by law.

24 We have the ASCAP/BMI model which is  
25



1  
2 voluntary. No writer has to license his works via  
3 ASCAP or BMI. They could find it in their self-  
4 interest to do so, but they don't have to, but is  
5 the book area or the journal area analogous in that  
6 respect, which is I think one of the issues before us.

7 Then if the effective way of measuring is  
8 by coding, should that be left to voluntary uses or  
9 should that be required by law?

10 A further problem in that regard is as to  
11 existing works which do not have the coding on them.  
12 What do you do about that?

13 One possibility, of course, would be to  
14 provide by law or by voluntary license, either way,  
15 that the royalty procedures would be effective only  
16 for works created on and after a given date, and that  
17 date would be such that the publishers would have  
18 ample notice to start putting the coding device on.  
19 That would avoid the retroactive problem by simply  
20 wiping it out.

21 Of course, then, those pre-published works  
22 that do not have coding on it could either mean that  
23 they are royalty free as far as the mechanism is  
24 concerned, and indeed possibly as far as the law  
25 is concerned, or it could mean that there simply would

1  
2 be a less efficient way of licensing those. I think  
3 that is another issue that is for us to think about.

4 Then on this matter of the guidelines and  
5 the royalty mechanism, as long as the guidelines remain  
6 in effect, one would think they do have to be taken  
7 into account in the royalty mechanism procedure.

8 On the other hand, one could envisage a license  
9 or an agreement whereby the libraries or whoever are  
10 in the licensee end would agree to ignore the guidelines --  
11 that is, would agree to pay even though under the  
12 guidelines they don't have to.

13 Now, why would they do that? I am not sure  
14 that they would or should, but one of the questions, it  
15 seems to me, and one that I think we are going to put  
16 to the King people is, what is the difference in  
17 administrative costs in a royalty mechanism between,  
18 on the one hand, administering a system but providing  
19 for non-payment under the guidelines, and, alternatively,  
20 paying for everything. That is to say it is conceivable  
21 to me that the administrative cost of having to check  
22 whether a work comes within the guidelines or not  
23 might be greater than the cost of paying across the  
24 board, if the cost of paying across the board is  
25 sufficiently small -- that is, paying for every copy.

1  
2 It might make more sense economically from  
3 the user's standpoint to forget the guidelines if the  
4 ultimate cost per page or whatever is sufficiently  
5 small, and if by taking into account the guidelines  
6 that cost would be increased somewhat due to the  
7 administrative costs of having to adhere to the guide-  
8 lines.

9 I throw that out very tentatively. I am  
10 not at all sure that is right economically or  
11 administratively.

12 MR. WEDGEWORTH: Before you proceed, Mel,  
13 I am not sure that I understand what the tradeoff is.

14 VICE-CHAIRMAN NIMMER: There is going to be  
15 a given cost of running this royalty payment mechanism  
16 and that cost is going to be borne by the users, by  
17 the immediate users of the library, or maybe ultimately  
18 by the consumer users, but whatever that cost is, I  
19 think will be greater if each time a request is made  
20 for a photocopy there has to be an administrative  
21 determination whether this request falls within or  
22 without the guidelines and what are the circumstances  
23 under which it is being done and so on, and if that  
24 is right that the cost is greater by virtue of having  
25 to adhere to the guidelines, it may be that the

T-9

1  
2 tradeoff is that the user has a lower administrative  
3 cost overall and hence a lower per page cost if the  
4 guidelines are not adhered to than if they are adhered  
5 to.

6 Am I making the question clear? I want to  
7 emphasize I don't know the answer.

8 MR. WEDGEWORTH: No, you haven't made the  
9 question clear, because I am not sure.

10 Say I put myself in the position of one  
11 of the libraries that are ostensibly going to be  
12 involved in this system. I don't know why I am  
13 going to go to the system in the first place.

14 VICE-CHAIRMAN NIMMER: All right.

15 MR. WEDGEWORTH: The only reason I would  
16 go in the first place would be based on the assump-  
17 tion that I am interested in some activity which  
18 might be considered an infringement of the copyright  
19 law.

20 VICE-CHAIRMAN NIMMER: Right. The assump-  
21 tion is that you are going to be engaging in activity  
22 that is outside of the guidelines as well as some  
23 activity that is within the guidelines, but if  
24 you are clearly not going to be engaging in any  
25 activity of the guidelines, then you don't want it,

1  
2 but assuming you are going to be engaged in some sub-  
3 stantial activity within the guidelines for which you  
4 don't have a license and therefore for which some  
5 royalty payment mechanism is desirable, then you  
6 obviously want to minimize that cost, and this is  
7 where I am suggesting maybe that cost can be lowered  
8 if you don't adhere to the guidelines, if you don't  
9 rely and take advantage of the guidelines.

10 At any rate, this is a question that I  
11 think we should put to the King people to make a  
12 comparative cost analysis of the mechanism with and  
13 without the guidelines.

14 MR. WEDGEWORTH: I don't really think they  
15 are competent to answer that question.

16 VICE-CHAIRMAN NIMMER: That may be.

17 MR. WEDGEWORTH: And I will give you a very  
18 basic reason why.

19 I think this is a weakness in that particular  
20 aspect of this King Study to begin with. By proceed-  
21 ing to test the feasibility of the design of a royalty  
22 payment mechanism concurrently with the survey which  
23 is ostensibly to establish the nature and character-  
24 istics of the activity that the royalty payment  
25 mechanism will control, I think they really are in

1  
2 an extremely difficult position, because they have  
3 to make many assumptions, such as one that you have  
4 made, prior to the time that they have the actual data  
5 that will describe the activities and it seems almost  
6 an impossible situation.

7 It is like a group of blind men trying  
8 to describe an elephant.

9 VICE-CHAIRMAN NIMMER: Well I don't know  
10 that I follow that.

11 MR. WEDGEWORTH: This doesn't invalidate  
12 the statements that you are making, but when you ask  
13 them a question directly, such as "We want you to really  
14 evaluate this," I want you to understand that you are  
15 asking them a question on which they have no data to  
16 use as a basis for that evaluation.

17 VICE-CHAIRMAN NIMMER: I think we are going  
18 to be having a sampling run of the mechanisms which  
19 they have in mind, and in that sampling, keeping track  
20 of man hours involved and so on, isn't it feasible  
21 to alternatively keep track of the man hours involved  
22 with and alternatively without taking into account the  
23 guidelines?

24 MR. WEDGEWORTH: No, it is not the administra-  
25 tive acts that I am talking about. I am simply saying

1  
2 that the situation they are in is, for example,  
3 trying to design a bank transaction system without  
4 knowing the nature and characteristics of the types  
5 of transactions that actually go on.

6 They could talk about man hours involved  
7 and make some projections about how many hours are  
8 spent doing this, that or the other, but until they  
9 get the data from the first part of the study, I don't  
10 think they are competent to answer that question that  
11 you pose.

12 Your answer is probably as good as theirs.

13 VICE-CHAIRMAN NIMMER: Anyway, may I just  
14 complete my report and then let's throw it open for  
15 general discussion. So much as far as what I have to  
16 say on the library end.

17 We then get into the question of what about  
18 the unsupervised machines, because up to now I have  
19 been talking about the supervised machines.

20 The unsupervised machines, and by that I  
21 include both the unsupervised machines in non-profit  
22 libraries and also machines in industry and perhaps  
23 in public libraries and all other machines, what do  
24 we do about those?

25 Certainly, on the unsupervised machines we

1  
2 can't expect the same kind of supervision and  
3 responsibility that we maybe do expect and I think  
4 have reason to expect from libraries, because I  
5 think libraries are more responsible -- in part that,  
6 and in part in an unsupervised machine there is nobody  
7 to do it unless the machine itself can do it.

8 Now, when we are dealing with the library  
9 supervised machines it is easy. If you have a work  
10 that is out of copyright, the librarian can simply  
11 make that determination. At least, that is one  
12 alternative.

13 The other is for the machine itself to make  
14 the determination by virtue of the coding or the lack  
15 of coding on it, but that gets into the whole question  
16 of the intricacies of the machine and how is that to  
17 be determined.

18 One possible approach on the unsupervised  
19 machines, it seems to me, is that we rely on the  
20 supervised machines to keep track of exactly what  
21 is being used, not just how much is being used but  
22 what is being used. In other words, who is entitled  
23 to be paid?

24 When we go to the unsupervised machines,  
25 we may simply keep track of all the uses without



1  
2 attempting to keep track of what is being used, so  
3 that a fund is built up by virtue of the use of the  
4 unsupervised machines that is involved in paying.  
5 Each time you put a coin in the slot, some fraction  
6 of that coin goes to a copyright fund and the machine  
7 operator is responsible for making that payment, but  
8 without a determination of who is to be paid, and  
9 then how do you determine that?

10 Well, one possibility would be you go on  
11 the sampling established by the supervised machines or  
12 not even all of those but some of them, some selected  
13 sample library or what have you, and this is of course  
14 analogous to ASCAP which does not try to keep track  
15 of every performance of a song in the country but goes  
16 on a sampling basis, so that, it seems to me, is a  
17 possible approach as to the unsupervised machines.

18 But then there is a further question of  
19 what is to require the operators of the supervised  
20 machines to make such a copyright fund, to take a  
21 part of what they are getting and put it into a  
22 copyright fund, particularly since, of course, a  
23 lot of materials in the unsupervised machines will  
24 not be in copyright, so why should they agree to  
25 pay anything?

1  
2 Well, this is something that we have to think  
3 about and talk about but it is conceivable to me --  
4 well, one initial issue is should the law require the  
5 operators of the machine to pay a given fraction of  
6 their total expenditure for copyright purposes, and  
7 then may the law do so even though it is known that  
8 some of the material is not protected by copyright,  
9 some of the material being reproduced.

10 It doesn't seem to me to be a possibility  
11 to say that the operator of the machine which we know  
12 will reproduce in part copyrighted material -- we  
13 make a kind of estimate as to the proportion of the  
14 material that will be a copyright without suggesting  
15 it is a precise accurate estimate, but it is an overall  
16 on-balance kind of estimate, and it is that portion  
17 of the total gross that must be paid into a copyright  
18 fund.

19 That money then is attributable only to the  
20 material which is in copyright, but it is collected  
21 from all.

22 Now, suppose somebody has a material they  
23 want reproduced, that it is not in copyright and they  
24 don't want to have to pay a fraction of the price per  
25 page for a copyright fund because it is not in copyright.

1  
2 Well, the alternative is to go to a supervised  
3 machine. Then they know they won't have to pay for  
4 the copyright, but if they want to use an unsupervised  
5 machine, then they know that there is a certain fraction  
6 that will be payable whether it is in copyright or not.

7 MR. DIX: You don't want a discussion now,  
8 I take it?

9 VICE-CHAIRMAN NIMMER: I do in just a moment.

10 MR. DIX: I have a lot of comments I want  
11 to make.

12 VICE-CHAIRMAN NIMMER: I realize what I am  
13 saying is controversial and a lot of it is for myself  
14 and not for the subcommittee, I should add.

15 Well, maybe I have said enough at this point.  
16 This is just sort of a free flow of ideas, and the  
17 idea is to get a discussion going.

18 MR. DIX: May I take up where you were?

19 VICE-CHAIRMAN NIMMER: Yes.

20 MR. DIX: Once you start on that road, it seems  
21 to me you end up pretty quickly at the point of some  
22 sort of attack on the machine itself, and it may not  
23 be bad. I am not clear in my own mind yet. This is  
24 the approach where some of the foreign countries have  
25 gone, I believe.

1  
2 VICE-CHAIRMAN NIMMER: May I say that the  
3 difference in what I have suggested is it would not  
4 be simply a flat tax regardless of use, No. 1. It  
5 would be geared to use.

6 MR. DIX: Yes.

7 VICE-CHAIRMAN NIMMER: And, No. 2, the money  
8 collected would at least in theory go to those whose  
9 material has been used based upon a sampling.

10 MR. DIX: I understand that. In other words,  
11 most of the machines that I know will keep a count so  
12 that there is no problem there of the use. Then the  
13 question of reducing it comes into some sort of a con-  
14 cept.

15 VICE-CHAIRMAN NIMMER: Yes.

16 MR. DIX: The other thing I simply want to  
17 react to is the implication you pointed out last that  
18 this might tend to send users from the unsupervised  
19 machines to the supervised, and that is one that I  
20 think librarians would reject rather hard, simply  
21 because all of the supervised machines in libraries  
22 I believe to some extent are subsidized.

23 It is very difficult to get an accurate  
24 cost. We had coin operated machines around the  
25 library and charged five cents a sheet. For supervised

1  
2 machines we charged the same price. Maybe we didn't  
3 have to do that, but we wanted to make it even and  
4 simple, and we were clearly subsidizing a little bit  
5 the supervised, so I see some problems of that sort  
6 in equity in the context of your suggestion.

7 MR. HERSEY: One thing I would like to add  
8 on the unsupervised machine, I think that we are  
9 seriously wanting data on unsupervised machines. We  
10 don't know whether the copying that is done on them  
11 is in fact similar in nature to that which is done  
12 on supervised machines, and it takes into no account  
13 the copying mills that just sit in every academic  
14 community and in most cities where copying is done  
15 simply as a service for profit.

16 There is one service of that kind both at  
17 Cambridge and New Haven which advertises on the walls  
18 to the universities that they could have their course  
19 material copied and the copying mill will sell these  
20 copies to the students. They are in the business of  
21 for profit printing -- publishing, in effect.

22 Whether this has any volume, I don't know.  
23 There seems to be a lot of traffic of that kind, but  
24 we have no data about this to make estimates about it  
25 that would make sense. I don't know how it can be

1  
2 gathered from an unsupervised machine, and we ought  
3 to try to make some effort to find out just what is  
4 being done.

5 VICE-CHAIRMAN NIMMER: What about King?  
6 Are they doing anything?

7 MR. FRASE: No, but there are some foreign  
8 studies, the principal one being Dutch, which indicates  
9 that the whole volume of copying is five percent or  
10 less of copyrighted material.

11 MR. HERSEY: We don't know whether that  
12 applies.

13 MR. FRASE: We don't know whether that  
14 applies. It is just a similar situation.

15 On the matter of the copying mills, John, I  
16 raise with the lawyers here the question as to whether  
17 the copyright proprietors, either individually or jointly,  
18 might not move in on them, because if they continue  
19 to do what they are doing now they are clearly going  
20 to be in violation of the law.

21 MR. HERSEY: Yes, no question about it.

22 MS. WILCOX: One of the codings that has  
23 been suggested is the same as what we were talking  
24 about yesterday, and that is that we are rewriting  
25 the law, and in the law specifically they say that

1  
2 the library won't be responsible for unsupervised  
3 machines.

4 VICE-CHAIRMAN NIMMER: But, Alice, that isn't  
5 rewriting the law.

6 First of all, we may recommend changing the  
7 law, sure, but on the unsupervised machines, what I  
8 have suggested does not create liability for the  
9 libraries for the unsupervised machines. It creates  
10 liability for those who are engaging in the photocopy-  
11 ing on the unsupervised machines -- I guess I did say  
12 the operator of the machine.

13 MS. WILCOX: Because the law says, and I am  
14 not a lawyer and I say this very *tenuously* but it seems  
15 that the law is clear that the individual has the  
16 responsibility if he uses an unsupervised machine,  
17 and what we are suggesting is some kind of a change.

18 Now, maybe that is the focus to do, but it  
19 seems to me it is not something that you immediately  
20 jump to that conclusion, and also we have to be very  
21 careful that we accept 107 as a basic principle before  
22 we jump to 108.

23 MR. LEVINE: A question I had, Mel, is,  
24 does this contemplate compulsory licensing?

25 VICE-CHAIRMAN NIMMER: Simply, that would be

1  
2 one route. The two possible models are that all or  
3 virtually all of the authors and publishers get to-  
4 gether in an organization and say to the libraries  
5 and the operators of the unsupervised machines, "To  
6 do this with our blessing you don't have to get our  
7 consent in advance in exchange for your agreement to  
8 pay X cents per page."

9 The other alternative would be compulsory  
10 licensing.

11 Certainly, the third possibly would be  
12 unacceptable. By that I mean having all this mechanism  
13 but you can't do it unless you check in advance with  
14 the copyright owner. That is obviously not feasible.

15 MR. PRICE\* : Mel, first on the King Study,  
16 these questions raised about options on the interpreta-  
17 tion of the guidelines and so forth --

18 VICE-CHAIRMAN NIMMER: Right.

19 MR. PRICE: : We hope to get to the meeting of  
20 the advisory committee on the 1st of March. We hope  
21 to get these resolved, whether right or wrong, but  
22 that is the direction that King is going in in its  
23 design.

24 VICE-CHAIRMAN NIMMER: Right.

25 MR. PRICE: Secondly, while by the end of the

\*(Mr. Douglas Price, Deputy Director, NCLIS) AFFILIATED REPORTERS, INC.



Wedgeworth

present study I agree with Bob/they will not have all the data, when they are doing the mechanism of what the characteristics are they will have that data by the end of the study, and assuming the Commission gets an extension they will have the data necessary to make these determinations. I mean the data will be there for additional analysis.

VICE-CHAIRMAN NIMMER: To make what determinations?

MR. PRICE: About the question that you raised as to the tradeoff.

VICE-CHAIRMAN NIMMER: You mean the administrative costs adhering to or not adhering to the guidelines?

MR. PRICE: The question here, because it has already gone to O.M.B., as I recall, and it is very complicated, was designed to get the answer regardless of what the advisory committee decided the direction it should go into, so that they should have some data in this area.

To go to another point, a question comes up on the ASCAP type thing. You are talking about a standard payment, and you find that people, and I hate to be doing this, but Earl Coleman\*, for instance,

\*(Earl Coleman, President, PLENUM Publishing)

1  
2 and perhaps with justice, contends he will provide a  
3 copy of anything at \$15 a crack by return mail, and  
4 he contends that if he gets anything less than that  
5 you will put him out of business, because his transla-  
6 tion journals are extremely expensive to produce.  
7 Their first copy cost is very large and the circula-  
8 tion is very small.

9 VICE-CHAIRMAN NIMMER: So you are saying  
10 that an across-the-board royalty fee applied by law  
11 might be unfair?

12 MR. PRICE: This is a question that has  
13 been raised. I am not taking a position; I am just  
14 pointing out that this is something that has to be  
15 reflected.

16 Coleman  
17 Earl/has taken a very strong position, and  
18 I think there are a number of others that are in this  
19 letter.

20 VICE-CHAIRMAN NIMMER: I can see that with  
21 these newsletters, they have a limited circulation and  
22 they rely on subscriptions. To have the same per copy  
23 rate for that as for other kinds of publications would  
24 be unfair.

25 MR. PRICE: This is the question Alice phrased  
about the viability of small circulations. This is  
a point to be considered.

1  
2 MR. FRASE: Doug, while you have the floor,  
3 we want to send out an interim report to the Commission.

4 Do you propose to supplement it before you  
5 make distribution with decisions taken at the March  
6 1st meeting?

7 MR. PRICE: This is my intent.

8 As to the March 1st meeting, it would in-  
9 corporate whatever decisions are made and circulate  
10 not only to the Commission but to the Conference  
11 on Resolution of Copyright Issues.

12 MR. FRASE: The upstairs-downstairs group?

13 MR. PRICE: Yes.

14 VICE-CHAIRMAN NIMMER: Thank you, Mr. Price.  
15 Are there any further comments?

16 (There was no response.)

17 VICE-CHAIRMAN NIMMER: The silence is  
18 deafening.

19 MR. MILLER: I'm a burnt-out pulp this  
20 morning.

21 MR. LACY: Mel, if this is an appropriate  
22 time to make some general observation --

23 VICE-CHAIRMAN NIMMER: Surely.

24 MR. LACY: It seems to me that we may be  
25 dealing, and I am really thinking out loud as I go

1  
2 along here to some extent, with two rather different  
3 classes of anomaly when we are talking about photo-  
4 copying and reprography. .

5 One is the use of photocopying with its  
6 use in the 30's and 40's and 50's and perhaps early  
7 60's as a sort of lubricant to a system of distribu-  
8 tion of materials which lie primarily in the printed  
9 copy distribution.

10 It was to fill in the gaps; to take care of  
11 ephemeral needs; to supplement note-taking and provide  
12 a copy of the journal or article you read in the  
13 library, but one that you wanted to have in your  
14 files in your office; to satisfy the need of a corpora-  
15 tion executive to send his neighboring executive with  
16 a note saying, "Did you see the piece in Business Week  
17 last week;" something that might be analogous to  
18 fair use in other areas which is not a supplement  
19 or replacement but an alternative to. It was just  
20 something that filled in the gap which operated under  
21 a sort of loose and uncontested fair use concept with  
22 no particular difficulties, and was intended to fill  
23 important social need.

24 I think that would extend also to the some-  
25 what random and occasional acquisition from a

1  
2 neighboring institution or nearby one of a copy of  
3 something that isn't in the institution that they are  
4 going to use.

5 I can see a different sort of possibility  
6 developing with two phenomena: (a) The great ease  
7 of copying and particularly of xerographic copying  
8 which is intended and doesn't require the use of a  
9 laboratory to develop the print, the actual photo  
10 reproduction. This is a much more flexible dispersion,  
11 uncontrollable as well as a cheaper operation.

12 Coupled with that, you have the use of  
13 computer bibliographic data bases, which greatly  
14 extends the knowledge of small previously bibliographical  
15 uncontrolled items of information that there is a  
16 demand for.

17 So you have developed a different kind of  
18 procedure -- not merely do we do more of the  
19 first sort of thing. I think we have developed the  
20 potentiality for an alternative method of publishing,  
21 which is something I have said before to the Commis-  
22 sion, an alternative method of publishing a kind of  
23 document that has been a great problem to publishers,  
24 to librarians, and to users, and that is the short  
25 research document, specifically the one, two, three,

1  
2           5,000 word piece.

3           It has never been much of a problem to  
4 publish books if they are a tangible item and you  
5 get enough money for them to handle the transaction  
6 costs of publishing and marketing, and the libraries  
7 are few enough in number, numerous as they are, so  
8 the libraries acquire them one by one and catalogs  
9 one by one, but when you are talking about the kind  
10 of contribution of the two or three or 5,000 word  
11 piece, that is always a problem. Nobody can afford  
12 to publish them one at a time. Nobody can afford  
13 to advertise them one at a time. Libraries cannot  
14 afford to buy them one at a time, and you couldn't  
15 catalog them separately.

16           You have solved that problem primarily by  
17 the research journal which publishes  
18           the journal of this or that, and  
19 you get hundreds of these contributions/ <sup>in a single journal</sup> The library  
20 buys these one at one time. The library just  
21 requires one subscription, it catalogs it as a  
22 material, and relies on other bibliographical devices  
23 to reach the individual articles.

24           Well, we now have a potentiality through  
25 the existence of the computer which makes the

1  
2 bibliographical control of these small contributions  
3 much easier than it used to be, and it makes the  
4 transaction costs of supplying much cheaper than  
5 it used to be, and you have a much easier way to  
6 reproduce it.

7           What we are building up to is a potentiality  
T-10 8 of on demand publication of articles, which is what  
9 really, as far as the publishers of journals are  
10 concerned, becomes not a lubrication of an ongoing  
11 system, but a replacement in whole or in part for it.

12           At the same time, I think it is also  
13 potentially, socially a tremendous opportunity be-  
14 cause it does make much more flexible this output.  
15 I don't think it would ever replace journals but  
16 it provides not merely just a really marginal area  
17 but it provides an alternative. That is the sort  
18 of problem, and increasingly the copy that is used  
19 is a photographic copy and this will work only if  
20 the users who use it in that way have the opportunity  
21 to contribute in the same way as the users of printed  
22 copies have, to the cost of authorship, editing and  
23 production and reproducing it in its final form.

24           Now, the first sort of function in this  
25 lubricating phase is almost inherently a library

1  
2 function. I mean you are going to the library and  
3 here is a piece that you want to take a copy of out  
4 of the library, and I don't think there is any way  
5 without imposing enormous burdens of expense or delays  
6 to centralize that kind of situation. You will never  
7 get away from the need of a library/<sup>to</sup>call quickly, but  
8 when we move beyond this to the new technologies and  
9 alternative modes of publication there is no real  
10 reason why it should be done in the library.

11 The library is not an efficient way to do  
12 it. It is not their business. It is a burden to the  
13 research libraries to provide copies of articles through inter-  
14 library loan: they never can charge what it  
costs them.

15 There is beginning to emerge an answer to  
16 this sort of thing. There are commercial firms which  
17 produce microfilms, which would like to expand beyond  
18 the buying of whole journals on film to individual  
19 articles, and there is a demand that publishers  
20 offer separate  
as well as subscriptions to journals.

21 Now, if we look beyond the particular system  
22 we are dealing with now and look ahead to what might  
23 be a system ten, twenty years from now, one could  
24 think of it perhaps moving in two ways, one in which  
25



1  
2 libraries will continue to do the kind of thing they  
3 have traditionally done, and one in which this real  
4 flow of essentially separate publications, both  
5 current publications and retrospective publications,  
6 would be channeled into a publishing operation. We  
7 could probably do it more efficiently and perhaps  
8 cheaper than the institution which for primary purposes  
9 had published them.

10 If one moves in this direction, you might  
11 find a case that only a relatively few firms were  
12 engaging in the large scale production of materials  
13 by publishing as opposed to this library thing. It  
14 might be possible for them to negotiate agreements  
15 directly with others more simply than with any fairly  
16 elaborate things we were talking about.

17 What is imposing the necessity of clearing  
18 houses, computer systems, and so on is the fact that  
19 you have a multiplicity of hundreds of potential  
20 reproduction centers, and obviously the number of  
21 transactions burden each with hundreds and  
22 hundreds of libraries negotiating with hundreds of  
23 publishers with respect to thousands or tens of  
24 thousands of journals almost leads you down the  
25 road to compulsory licensing, fixed fees and codings

1  
2 and computer systems.

3 Now, if it were possible, and I am not  
4 saying it is -- I am thinking out loud and I am  
5 only suggesting this for discussion and not a con-  
6 clusion -- if it were possible to define with suf-  
7 ficient clarity the area one would think of as fair  
8 use and one which we felt simply lubricated, to use  
9 that phrase again, an ongoing system, and adopted  
10 legislation intended to channel anything beyond that,  
11 call it publishing by the library operations without  
12 blocking what is essentially the library function,  
13 I think you might find it possible to move with a  
14 less complex operation, and we also might find it  
15 possible to offer incentives to develop a more  
16 efficient separate publishing operation than/other-  
17 wise be the case, and I would hope that this would  
18 have some attention from the subcommittee.

19 MR. HERSEY: I think what you are proposing  
20 is going to drive some people out of business. Is  
21 it going to do that?

22 MR. LACY: Who?

23 MR. HERSEY: People who publish journals.

24 MR. LACY: On the contrary, I think this  
25 would be a means of protecting anybody from anything

1  
2 but marginal use of their material and forcing the  
3 commercial agents to deal with them man to man to  
4 get a freely negotiated rate.

5 As a general publisher, I would feel much  
6 more comfortable with this.

7 VICE-CHAIRMAN NIMMER: Alice was suggesting  
8 yesterday, and along with your suggestion, Dan, that  
9 we are at the point where people in their own home can  
10 have a console and they can press a button and go to  
11 the central source and receive a copy of the stuff  
12 that they particularly want, having looked at an  
13 index or whatever of what is available, home or office  
14 or whatever.

15 When and if we get to that point, it seems  
16 to me the copyright problem becomes very simple. There  
17 is no problem at all.

18 Arthur?

19 MR. MILLER: I don't feel sorry for a  
20 journal publisher who now quite clearly is  
21 making more money on the reprints than on the basis  
22 of the subscriptions to the magazines.

23 My limited projection is that the problem  
24 is one of delivery, that lots of people would go to  
25 the source rather than use reprography, if there were

1  
2 a convenient delivery mechanism.

3 Writing away to the magazine has a high  
4 transaction cost to it, and I gather the idea that  
5 Dan is putting forth is if somehow we could engineer  
6 a delivery system that is somewhere between writing  
7 away to the publisher and the imagery of the home  
8 delivery console, then that too would go a long way  
9 to make the photocopying problem disappear, and it  
10 may well be that there are incentives that could be  
11 created, for example, in Cambridge or in New Haven  
12 to have right in the book store a separate department  
13 where, on some consortium basis, assuming no violation  
14 of the Anti-Trust Law, publishers could provide stocks  
15 of material.

16 MS. WILCOX: I think the first analysis  
17 is that it would make it much easier for micrographic  
18 control using a computer to deal with separates rather  
19 than having to deal with the journal as a whole. The  
20 micrographics should be making it possible to do  
21 something with the publishing features of the delivery  
22 system; who could play a part in this and where it  
23 could be done.

24 VICE-CHAIRMAN NIMMER: Is that correct?

25 MR. PRICE: Mel, as to the delivery system,

1  
2 one of the things the Periodicals Access Program,  
3 which is a task force which we have been sponsoring  
4 for the last year and their recommendation is coming  
5 out now and is designed to begin the improvement of  
6 delivery, to get around this, you know, just finding  
7 a publisher and writing to him and getting turned  
8 down and so forth, is I think a significant factor  
9 there.

10 MR. LACY: Well, actually on delivery  
11 systems, you have two questions. If you are working  
12 in a library that has a journal at hand and you have  
13 the volume or the issue out reading it in the reading  
14 room and outside the reading room there is a dime-in-  
15 the-slot machine, you could copy it and obviously  
16 nobody can compete with that instantaneous delivery,  
17 but even today if you are in a library that doesn't have

18 the journal in question and it is a question of  
19 getting it by having another library make a copy  
20 for you, you will probably get a good deal faster  
21 service on that day particularly, if you have a large  
22 bibliographic request by sending it to <sup>the Institute of Scientific Information (I.S.I.)</sup> which  
23 promises at least a 36 hour turn-around.

24 MR. PRICE: But if it is a journal that they  
25 have.....

1  
2 MR. LACY: Well, they have several thousand  
3 journals.

4 MR. PRICE: To get back to the fact, they  
5 have several thousand, but to go back to the discovery  
6 in MINITEX the surprising thing is at least the  
7 number of titles found in one year's transaction at  
8 MINITEX ... they have 35,000 titles, but only....

9 MR. LACY: What is suggested though is  
10 that a few hundred might accommodate 95 to 99 percent  
11 of the requests.

12 VICE-CHAIRMAN NIMMER: Alice, did you want  
13 to say something?

14 MS. WILCOX: I am wondering. The University  
15 Microfilm possibility of coding suggests a model of a  
16 distribution system in a variety of locations.

17 VICE-CHAIRMAN NIMMER: This is the new  
18 experiment that we were talking about with microfilm.

19 MS. WILCOX: That would be combining micro-  
20 films with codes and a specific article and recording  
21 that and being able to publish on demand, if you will,  
22 and distributing that to specific locations.

23 Is that how you perceive that?

24 VICE-CHAIRMAN NIMMER: Yes.

25 MR. FRASE: I think in addition to the

1  
2 operation which Dan Lacy has mentioned, there is still  
3 another which Doug Price touched on, and there is  
4 the report of the Palmour Study and a central  
5 periodical copy supply house, similar in some  
6 ways to the BILD, which has been accepted by the  
7 National Commission on Libraries and Information Science.

8 MR. PRICE: It has not been accepted.

9 MR. FRASE: I thought it had at your last  
10 meeting.

11 MR. PRICE: No.

12 MR. FRASE: In principal.

13 MR. PRICE: They are going to make some  
14 revisions and circulate it and solicit comments.

15 MR. FRASE: When those revisions are made  
16 and the report is available for distribution, the Commission  
17 will get it. I have a copy of the draft. It hasn't yet  
18 been changed.

19 MR. PRICE: It has.

20 MR. FRASE: This in a sense would set up  
21 still another very large central organization for authorized  
22 copies.

23 VICE-CHAIRMAN NIMMER: Bob Wedgeworth?

24 MR. WEDGEWORTH: I think I can really see  
25 tremendous difficulties in trying to move forward in

1  
2 pursuit of this, because while it is easy to understand  
3 the specific thrust in terms of the mechanisms, I am  
4 not really sure what is motivating us down any one of  
5 these particular paths.

6           Going back to the kind of discussions that  
7 we had yesterday in which we asked the other sub-  
8 committees to determine some rationale for their  
9 recommendations in one way or in the other, I was  
10 sitting here trying to determine, for example, would  
11 the various options that have been mentioned provide  
12 a fairer rate of return to the copyright proprietor?

13           Now, particularly interesting is the comment  
14 that Arthur made, and one of the questions that I would  
15 raise would be if the general publisher is at present  
16 receiving more income from the separates and had to do  
17 entirely without the subscriptions, how would that  
18 picture change?

19           To me, that is a rather significant question.  
20 I will give an example. If you take the suburban  
21 library system which is outside Chicago, which is  
22 a group of small public libraries that are operating  
23 in a system in which they have defined their acquisi-  
24 tion policies with respect to their immediate  
25 constituencies, but things above and beyond what



1  
2 they have, still viewed within the confines of Sec. 108 ,  
3 they go to each other for. For example, if you  
4 want a rather esoteric item, that may be in one  
5 library and it may not be in another library.

6 Well, what we have been able to observe  
7 over a period of time is the amount of money avail-  
8 able to each of those libraries individually has  
9 grown tremendously during the periods that they have  
10 been organized in a system as distinct from when they  
11 were operating individually, and there is a central  
12 tendency that I think is important in looking at  
13 this type of activity, because if the library is  
14 an independent entity and has to define its resource  
15 capabilities alone, there is a tendency to subscribe  
16 to those journals that meet their most immediate  
17 needs only and, as a consequence, the collections  
18 tend to look more and more like each other.

19 On the other hand, when they are involved  
20 in a system, and it releases them to be a lot more  
21 flexible in terms of what they subscribe to, in terms  
22 of meeting an interest that may be a minority inter-  
23 est in this community but of very little interest in  
24 another community, and I think this accounts for the  
25 enormous spread of activity over a large number of

1  
2 journals, even though the frequency of requests for  
3 certain journals does concentrate itself on a small  
4 number.

5 Now, the thing that I am trying to get to  
6 is that if we fathered a system which would over-  
7 emphasize access to separates, I think you may destroy  
8 the subscriptions, and the question that I think we  
9 ought to answer before we get to that recommendation  
10 is, do we need that underpinning of the subscription  
11 that is being acquired by these various individuals  
12 and institutions in order to support that activity  
13 that goes on with the separates.

14 VICE-CHAIRMAN NIMMER: May I try to answer  
15 that? I am not sure I will adequately, but it seems  
16 to me that if we evolve a system which somehow  
17 protects copyright within, alternatively, the  
18 subscription or the separates model, then shouldn't  
19 the marketplace operate? The publisher or the copy-  
20 right owner is not required to sell via the separates,  
21 nor required to sell via the subscription.

22 Shouldn't the marketplace determine then  
23 which is the more desirable route?

24 MR. HERSEY: But those things, if I under-  
25 stand them, mean that you design in a market such as

1  
2 this a self-fulfilling --

3 VICE-CHAIRMAN NIMMER: If you insist on  
4 copyright protection for separates, then you eliminate  
5 the subscriptions.

6 MR. WEDGEWORTH: Even more important, if  
7 you go back and don't have the guide posts, you could  
8 get to the point where without that subscription the  
9 cost of the separate becomes so expensive that you  
10 destroy the motivation to even go to that particular  
11 source for it, and so in the end you have a result  
12 that is inimical to what I would consider to be our  
13 original objective.

14 MR. LACY: Well, maybe I ought to explain  
15 what I intended to say.

16 MR. WEDGEWORTH: Before you do that, I wasn't  
17 taking issue with what you were saying. I was simply  
18 pointing out some key questions to be answered along  
19 the way.

20 MR. LACY: Let me say that it is not my  
21 thought to substitute separates publishing, except under very  
22 rare circumstances,<sup>for</sup> journal publishing. I think it  
23 might make possible the continuance of a good many  
24 journals of relatively limited circulation, because  
25 though there are only a limited number of potential

1  
2 customers for the entire journal, there might be a  
3 substantial second level layer of demand for individual  
4 articles, and if that demand were sharing the cost of  
5 producing the original journal I suspect that the  
6 income from that would far from eliminate them, but  
7 would tend to reinforce them.

8           What I am trying to say is that we have  
9 tended to see this whole issue of photocopying as  
10 one involving a polarity between libraries and their  
11 clients on one side, and publishers and authors on  
12 the other, and in point of fact there is a whole area  
13 here that doesn't necessarily have anything to do with  
14 libraries, and in an effort on the one hand to give  
15 libraries an appropriate freedom we may be weakening  
16 copyright in ways that are very damaging outside  
17 libraries or, conversely, in an effort to protect  
18 what isn't necessarily a library function, we might  
19 be putting undesirable constraints and limitations  
20 on libraries.

21           For example, the National Science Foundation  
22 has granted           a particular research project  
23 on the SST and they went to Lockheed to get  
24 a computer generated bibliography of all articles that  
25 relate to the subject of this plane. Let's say they have

1  
2 150 articles. Perhaps every one of those articles  
3 is in the library, the journal is in the library  
4 or institute they are working with, but they would  
5 like to have in the files at the project site a  
6 collection of just these articles.

7           Getting those is not particularly a library  
8 function, I think. You know, they go to the library  
9 of the institution and say, "Here are 150 articles  
10 that we would like copies of." The library then has  
11 a tremendous burden to reproduce that even if they  
12 have them all.

13           This is the kind of thing a commercial  
14 service could quite quickly and in fact does very  
15 frequently provide many institutions that have  
16 federal overhead money running out of their ears  
17 and turn to a commercial service. They have  
18 someone go in the library and photocopy it to  
19 speed it up.

20           But there are a number of areas here.  
21 This could be a direct publisher-customer relation-  
22 ship which doesn't need to burden libraries at all,  
23 and I think we ought to think of it in that broader  
24 field.

25           MR. WEDGEWORTH: I would agree, except I

1  
2 would add something. What I am saying is almost the  
3 converse of what you were saying.

4 I see that there is an underpinning of  
5 activity that goes on in libraries that is fundamental  
6 to the system, and when I go back and I look at some  
7 of the policy objectives, I think that we are going  
8 to have to take those into consideration as we analyze  
9 these various options, because, on the one hand, we  
10 could, for example, produce a system which would make  
11 it possible for users who live in wealthy communities,  
12 to have broad access to materials and users who live  
13 in poor communities have less access to materials.

14 MR. LACY: So what?

15 MR. WEDGEWORTH: It would simply exaggerate  
16 something that libraries have overcome in this country  
17 to a far greater degree than other countries in equal-  
18 izing access to material.

19 I think this would be inimical to the kinds  
20 of protection that John is seeking, because he is  
21 not concerned about the writers who can do well from  
22 the economic return on their efforts, but encouraging  
23 young writers who don't have that wherewithal in the  
24 beginning and I simply would urge that as we begin to  
25 look at these options, that we really describe what it is

1  
2 we are trying to achieve, and this means that we have  
3 to establish what we are looking for.

4 We look at the results from the King Study  
5 and we see the characteristics of this particular set  
6 of data that comes from libraries as distinct from the  
7 other data. I think we first have to look at fair  
8 use.

9 Now, fair use is established in the law.  
10 If there are some reasons that you want to attack  
11 fair use, I think we have to start there. If we  
12 assume fair use, then we have to say, well, what is  
13 it that these institutions and other individuals and  
14 institutions are doing that needs to be controlled  
15 specifically, and I think this gets partly at what  
16 Dan is saying, but I am putting more emphasis on  
17 a distribution system that is established that pro-  
18 vides broad access for cultural and educational and  
19 scholarly uses, and I think that we need to say in  
20 the beginning whether we support that or whether we  
21 do not support that.

22 VICE-CHAIRMAN NIMMER: Bob, when we start  
23 getting to the question of what mode of distribution  
24 do we want to encourage, what mode of distribution do  
25 we want to discourage, we may be on very dangerous

1  
2 ground.

3           Wouldn't it be like saying at the beginning  
4 of television that we should evolve some copyright  
5 system that will discourage television because that  
6 will hurt the motion picture industry and the motion  
7 picture industry is important to us? Don't we want  
8 to open all channels and let the computer chips fall  
9 where they may?

10           MR. WEDGEWORTH: That is precisely the wrong  
11 question and not the one I am urging that you ask.

12           The question that I would ask is are you  
13 trying to facilitate information flow by these systems  
14 that you are suggesting? Are you trying to produce  
15 a fairer return for the creator of the work? Are you  
16 trying to minimize the disruptions in the free market?

17           Those are some of the questions that were  
18 asked yesterday with respect to the other reports,  
19 and it seems to me that they are just as valid for  
20 this subcommittee's activity as for the other two  
21 subcommittees' because having made some preliminary  
22 decision on those objectives, I think other questions  
23 tend to fall in place.

24           VICE-CHAIRMAN NIMMER: I think perhaps for  
25 the reporter and others we should take a ten minute



1  
2 break.

3 MR. HERSEY: I was about to say that I think  
4 we should address ourselves to those fundamental  
5 questions.

6 VICE-CHAIRMAN NIMMER: Surely.

7 (After a short recess.)

8 VICE-CHAIRMAN NIMMER: All right. Shall we  
9 resume?

10 I suppose we can resume the free flow of  
11 discussion we have had up to now, which I think is  
12 quite valuable. Anyone?

13 (There was no response.)

14 VICE-CHAIRMAN NIMMER: Well, shall we  
15 address ourselves, since the problem was raised  
16 before we broke, as to what are our underlying  
17 objectives with respect to any royalty mechanism?

18 In one sense, I think you compare the  
19 discussion of yesterday and there are parallels, but  
20 I think there are differences as well. That is the  
21 problem that John Hersey was concerned with yesterday.  
22 At least, that problem I think does not apply here,  
23 namely, the problem of authorship, which is the sort  
24 of thing that copyright should apply to.

25 The core of the problem now has to do with

1  
2 areas that no one will deny have to do with authorship.

3 MR. WEDGEWORTH: I think there is a parallel  
4 to what John was saying yesterday. Without stating  
5 it at length, I think a part of what I was alluding  
6 to earlier is that there is a very traditional and  
7 desirable relationship which librarians have had  
8 with the creators and indeed the users of the libraries  
9 over the years, and without stating what our objectives  
10 are, not in designing a royalty payment mechanism, but  
11 making access to materials that may be under copyright-  
12 without stating what our objectives are, we run the  
13 risk of trampling on that relationship which I con-  
14 sider to be a very important element in the transmittal  
15 of our cultural areas.

16 VICE-CHAIRMAN NIMMER: I agree. That's right.

T-11 17 Since no one else is speaking up, I will try  
18 to start the ball rolling.

19 Going back to the original rationale of  
20 copyright, I suppose, and then seeing how that  
21 applies in this context, we go back to the idea that  
22 public dissemination and public access and the avail-  
23 ability to the public of the works of authors is en-  
24 couraged, and indeed a necessary condition for that  
25 is a property right in the author or copyright, the

1  
2 ability of the author to be paid for his work, and  
3 presumably that goes, I would think, to the various  
4 avenues in which the works may be marketed unless there  
5 are countervailing considerations in given avenues where  
6 the public interest is hurt rather than encouraged by  
7 this general recognition.

8 In other words, I think there is a general  
9 presumption that the public is benefited if the author  
10 is paid for his work, and the burden, I would think,  
11 goes on those who would say that in this instance  
12 that formula should not apply.

13 I don't think that we have  
14 to redebate the whole question that presumably  
15 the founding fathers debated when they put in the  
16 copyright laws in the Constitution.

17 MR. DIX: To put it slightly differently, as  
18 I remember the basic cause, let's say two things. The  
19 author said something about distributing the work --

20 VICE-CHAIRMAN NIMMER: To promote the progress  
21 of science and the useful arts, the copyright is granted.

22 MR. DIX: John is the only genuine author here.  
23 Some of us write, but we are not really authors as such.

24 Isn't the emphasis on the product rather than  
25 the author and getting the product of this intellectual

1  
2 work to the user rather than on simply saying that he  
3 must be paid? Of course he must be paid.

4 VICE-CHAIRMAN NIMMER: Of course it is a  
5 balance, is it not?

6 MR. DIX: Yes, but there is the distribution,  
7 and the purpose of copyrighting presumably is to force  
8 an adequate distribution.

9 VICE-CHAIRMAN NIMMER: But the further thought  
10 that there is no copyright, to envisage a system with  
11 no copyright at all, one might say that that is the  
12 least obstructive way of disseminating, and if the  
13 objective is dissemination, why copyright at all?

14 But the thought is that a necessary condition  
15 to effect the dissemination is copyright in order to  
16 encourage material so that there is a field to be  
17 disseminated.

18 MR. DIX: There are those who don't believe  
19 that. I am not one of them.

20 MR. HERSEY: Really!

21 VICE-CHAIRMAN NIMMER: We are certainly  
22 not precluded from starting all over again and  
23 concluding that for our purposes copyright is just  
24 not a good idea.

25 Well, at least we start with that as a

1  
2 premise that by and large copyright is desirable, not  
3 only for the selfish or personal benefit of the author,  
4 but also it is desirable for society, because this is  
5 the way that society ultimately has access to works  
6 and, I might add, without censorship that would be  
7 involved if instead of copyright we just have govern-  
8 ment subsidies and authors are all on the government  
9 payroll and forget about copyright.

10 That might increase dissemination, but it  
11 would carry side effects, First Amendment type side  
12 effects, which I think most of us would find unaccept-  
13 able.

14 If we start with that as the premise, then --  
15 well, this one I would like to hear from others, how  
16 that formula may not be applicable when we are talking  
17 about a royalty payment mechanism or whatever other  
18 way we want to channel it in the copyright to photo-  
19 copy.

20 MS. WILCOX: To pick up a little bit about  
21 what was said yesterday, that we start with some  
22 assumption on the distribution and its role in  
23 society and that we do recognize that libraries may  
24 play different kinds of roles such as libraries in  
25 the academic community and libraries that relate to

1  
2 a parent organization; for example, in the academic  
3 community, the goal of the library is to support the  
4 goals of the university and, therefore, I would find  
5 it difficult for us to suggest in the committee that  
6 there be an alternative distribution system that would  
7 interfere with that relationship that is a long and  
8 established one, and I think a good one -- in other  
9 words, saying that it is not appropriate for the  
10 library to continue to provide distribution of the  
11 material.

12 VICE-CHAIRMAN NIMMER: Is anyone suggesting  
13 that we say it is not appropriate as compared with  
14 providing a copyright mechanism for alternative  
15 methods that technology is going to produce for  
16 dissemination?

17 MR. WEDGEWORTH: What I did envision was  
18 part of what was said earlier relates to the role  
19 that 107 and 108 play, and I didn't mean to start  
20 from scratch.

21 I think we have to start with 107 as a  
22 basic provision in the law as we now have it effective  
23 January 1, 1978, and then you have a limitation on  
24 107 with respect to libraries and archives established  
25 within 108.

1  
2 MR. LACY: Well, an extension of 107, not  
3 a limitation of it.

4 MR. WEDGEWORTH: It depends on how you want  
5 to look at it.

6 MR. LACY: Well, the report is quite explicit  
7 that 108 is intended to give privileges over and above  
8 those granted in 107. That is, the restriction thing  
9 in 107.

10 MR. WEDGEWORTH: Okay, but those two sections  
11 of the law seem to me to be a good starting point, and  
12 my question is, in looking at this matter of the royalty  
13 payment mechanism, I would say that maybe we should  
14 consider making recommendations that would destroy the  
15 basic freedom of a library and say we don't want a  
16 copy outside the rights that are given to us within  
17 that law.

18 I can understand this supplementary system  
19 operating to do things above and beyond what is pro-  
20 vided for in the law, but when you superimpose that  
21 on top of 108, it seems to me that you are taking  
22 away some basic rights that are provided in the law  
23 itself.

24 VICE-CHAIRMAN NIMMER: May I respond to that?

25 First of all, 107, the act itself, merely

1  
2 sets forth the definition of fair use culled from the  
3 cases during the last seventy years or so, and it is  
4 very vague. It doesn't really say what is fair use  
5 or what is not fair use in copyrights, and the commit-  
6 tee's report says it is intended to in effect codify  
7 what the case law has been.

8 If one looks to the case law, it doesn't tell  
9 us very much. There is the Williams & Wilkins case, which is  
10 the only really direct case on photocopy, but there,  
11 as you recall, there was a four to three decision in  
12 the Court of Claims and a four to four decision in  
13 the United States Supreme Court, Mr. Justice Blackman  
14 not participating, and, parenthetically, Mr. Justice  
15 Blackman did participate in the only other case that  
16 comes closest to the photocopying where we have the  
17 fair use case, namely, Wihtol versus Crow, in which  
18 a three judge Court of Appeals in the 8th Circuit  
19 including then Judge Blackman held that a teacher re-  
20 producing forty-eight copies for his class was not  
21 fair use, so what is fair use on the case law is very  
22 vague.

23 Now, it is true that the committee as a House  
24 Committee report adds a guideline for teachers under  
25 107, and if we assume that that is the equivalent of a



1  
2 statutory test which itself some lawyers would dis-  
3 pute, but assuming that to be the case it does give  
4 some specific guide as to what is fair use for  
5 teacher reproduction, but only that.

6 108, I agree with Dan Lacy, does go further,  
7 and that is a matter of statutory test, although we  
8 then of course would have further guidelines on that  
9 which would have the same status as the teacher guide-  
10 lines.

11 I am not suggesting and I did not intend  
12 to suggest, Bob, that as a matter of policy we should  
13 decide that 107 and 108, whatever they mean, are not  
14 acceptable. Rather, what I was suggesting is going  
15 on the premise that libraries and others will want to  
16 engage in photocopying beyond 107 and 108, whatever  
17 they mean and since therefore some kind of viable  
18 mechanism does seem to be desirable in that beyond  
19 107-108 area, if we agree to that, then the further  
20 pragmatic question arises: Whatever effective mechanism  
21 can be worked out in that beyond 107-108 area.

22 This is just a question. It may be that  
23 from an administrative practical economic standpoint,  
24 the effect of administering of such a system beyond  
25 107-108 would be more expensive by making the exemptions

1  
2 to 107 and 108 than it would be if we don't make the  
3 exemptions, so that from the library standpoint as well  
4 as the publisher's standpoint, from the user's stand-  
5 point as well as the author's standpoint, whatever, it  
6 may not make sense in dollars and cents to take advantage  
7 of what they feel they have the right to take advantage  
8 of, the 107-108 exemption, and I was only raising that  
9 as a question.

10 MR. LEVINE: We come to an institutional  
11 situation like libraries in which the administrative  
12 costs which would be perhaps lesser by payment for  
13 every transaction rather than attempting to make the  
14 decision as to whether it falls under 107 and 108,

15 is one thing, but when you get down to the  
16 user who is going to be charged an additional increment  
17 for copyright royalties, even though making that copy  
18 might be a fair use, I don't know, but I think you may

19 into problems that would be quite constitutional  
20 and on the constitutional level, but you may be running  
21 into problems.

22 MR. WEDGEWORTH: There is a question that  
23 I have had that relates to an illustration that was  
24 given earlier this morning that we were talking about  
25 briefly during the break.

1  
2 If you have these agencies, whether they  
3 are independent agencies or operating within larger  
4 institutions that we might generally characterize as  
5 photocopy mills, the question that I had is: does the  
6 individual have to make the copy personally in order  
7 to claim the fair use exemption or would these organi-  
8 zations who act as agents, ostensibly for profit, be able to  
9 reproduce as many copies as someone would ask  
10 them, are they operating outside the law as we under-  
11 stand it?

12 VICE-CHAIRMAN NIMMER: Well, it seems to me  
13 that the one copy per person guideline breaks down  
14 when you have these mills. For the mills to say we  
15 are only doing one copy per person and hence if it is  
16 fair use for them it is fair use for us, I think is  
17 like a commercial publisher saying we are printing  
18 infringing books we know, but, don't worry, we are  
19 only selling one copy per customer and nobody gets  
20 more than one copy.

21 Well, at the retail level, nobody wants  
22 more than one copy per customer, so that if you have  
23 the intermediary commercial operation, I don't see  
24 why it is any different between a mill operation and  
25 a publisher.

1  
2 MR. WEDGEWORTH: But isn't there a distinc-  
3 tion because, of course, the law does provide an  
4 educational institution with the right to make that  
5 one copy, and my question is, is this extended to this  
6 for profit operation?

7 VICE-CHAIRMAN NIMMER: Are you talking about  
8 108 or 107?

9 MR. WEDGEWORTH: Well, I am not really  
10 sure.

11 VICE-CHAIRMAN NIMMER: Well, in 108 the  
12 definition of what is for profit and what is not for  
13 profit has been made somewhat obscure by some of the  
14 house commentary, I think. That is, they speak of  
15 for-profit institutions engaging in not-for-profit  
16 photocopying, and that they suggest should be included  
17 as not-for-profit.

18 MR. WEDGEWORTH: But they were also talking  
19 about libraries in those institutions.

20 VICE-CHAIRMAN NIMMER: Right, so in that  
21 context, maybe DuPont's Library is non-profit and is  
22 reproducing copies for which they don't give a profit  
23 but when you talk about the mill of the type that John  
24 Hersey referred to, that doesn't come into it, and it  
25 seems to me they clearly have no claim under 108.

1  
2           The question would be, do they have a claim  
3 under 107 of fair use.

4           MR. WEDGEWORTH: That is the question that  
5 I was asking.

6           VICE-CHAIRMAN NIMMER: And there I would  
7 argue as I did a moment ago that if a commercial  
8 publisher doesn't have that right, which pretty clearly  
9 they don't, just because they are only selling one copy  
10 to a customer, one infringing copy to a customer, I  
11 don't see any distinction with the mills.

12           The distinction, I suppose, is that it is  
13 on order rather than printing up a number of copies  
14 in advance, but to me that is not a viable distinction.

15           MR. MILLER: The mill is producing multiple  
16 copies for classroom use within the guidelines attached  
17 to the legislative history. The professor says, "I  
18 have just had an inspiration and I have satisfied  
19 brevity, spontaneity and cumulative effect," and calls  
20 the mill and says, "One hundred of my students are  
21 going to be over there by 4:00 o'clock. I want you  
22 to have a hundred copies of X, Y and Z."

23           VICE-CHAIRMAN NIMMER: That's a tough one.  
24 I am not sure about the answer to that.

25           MR. LACY: Well, I would think if you preface

1  
2 that with what you were doing was printing a book on  
3 contemporary poetry and that book quoted three para-  
4 graphs or quoted three stanzas, let's say, from some-  
5 body's poetry where it was a fair use, the printer,  
6 even though he is printing the book for money,  
7 would benefit by the fair use standard.

8 VICE-CHAIRMAN NIMMER: Any other comments?

9 MR. LACY: A technical point if we have  
10 exhausted our discussion.

11 VICE-CHAIRMAN NIMMER: I think perhaps we  
12 have.

13 This is obviously something we will have  
14 to come back to and think about it a lot more, but  
15 I think perhaps this has been useful.

16 This is the first time the Commission as  
17 such has talked about the subject of photocopying,  
18 and I think it is high time that we did, and we  
19 are going to have to get back to it, but perhaps this  
20 is enough for now.

21 MR. LACY: Well, the technical point I  
22 raise is when Irwin Karp was testifying at a previous  
23 meeting, and that was the language of Section 201(c),  
24 he quoted the section and it says:

25 "Contributions to collective works. -- copy-

1  
2 right in each separate contribution to a collective  
3 work is distinct from copyright in the collective work  
4 as a whole, and vests initially in the author of the  
5 contribution. In the absence of an express transfer  
6 of the copyright or of any rights under it, the owner  
7 of copyright in the collective work is presumed to have  
8 acquired only the privilege of reproducing and distribut-  
9 ing the contribution as part of that particular collec-  
10 tive work, any revision of that collective work, and  
11 any later collective work in the same series."

12 Most of the thinking that has gone into  
13 clearing houses has assumed that if the clearing house  
14 has the publisher of the journal's assent, that is all  
15 that the clearing house needs, and the payment to the  
16 publisher is all that is required to meet any obliga-  
17 tions, leaving up to the publisher to effect such a  
18 distribution to the author as the arrangements with  
19 the author provide for.

20 Quickly interpreted, this act would reserve  
21 to the author in the absence of an express agreement  
22 to the contrary any right to agree to any photocopying  
23 or xerographic copying of a contribution of his to  
24 a journal, and would deny the publisher the right  
25 to grant anybody permission to do that and to provide

1  
2 the payments directly to the author.

3 If that is the way the law is being construed,  
4 and I think it is certainly the way that the law was  
5 construed, then we have I think a considerable problem  
6 in connection with all of the kinds of clearinghouse  
7 operations that we are talking about, based on the  
8 presumption that the publisher's permission  
9 is adequate to the copying or that payment should be  
10 directed to him.

11 It would probably be that with respect to  
12 those journals that are apparently most frequently  
13 copied -- that is, scholarly and scientific and  
14 technical journals -- there would be no problem in  
15 the journal publisher's getting from the author either  
16 all rights in the piece or certainly rights in this  
17 particular xerographic area, because the author is  
18 anxious to get it published and not to receive the  
19 revenue and doesn't want to be bothered with applica-  
20 tions for permission and so forth.

21 I think it far less likely to be the case  
22 that a literary journal would be able uniformly to  
23 get permission from the author to grant this sort  
24 of right.

25 It seems to me that the subcommittee should



1  
2 bear this in mind and probably think of the research  
3 projects like King's designing the royalty payment  
4 mechanism, and when we confront the problems, that  
5 we deal directly not only with the problems of journals  
6 but with multiples of thousands of individual authors.

7 In most cases that would not be true, but  
8 it would be very difficult and you would have a  
9 problem of defining the cases or, alternatively, con-  
10 sidering the language of the extent and the propriety  
11 of collective works to direct reproductions involving  
12 author's rights, with the copy type and type size and  
13 so on type of contribution of a collective work.

14 MR. DIX: Does the phrase, "collected works"  
15 include journals?

16 MR. LACY: Yes. This is addressed to a very  
17 specific problem which is a question of the rights of  
18 the author, and it is something like movie rights and  
19 television rights and subsequent anthology rights to  
20 his works.

21 MR. WEDGEWORTH: I received a copy of the  
22 results of the copyright law review committee of  
23 Australia and I was wondering if the rest of the  
24 Commissioners had also received that publication.

25 VICE-CHAIRMAN NIMMER: Yes.

1  
2 MR. WEDGEWORTH: Without commenting on the  
3 conclusion that they reached, I thought that was a  
4 very thorough exploration of the various issues that  
5 this Commission is facing as well, and I just wanted  
6 to be sure that everyone did receive a copy of it.

7 VICE-CHAIRMAN NIMMER: I gather some have  
8 not.

9 MR. LEVINE: We will get out copies to those  
10 who have not.

11 VICE-CHAIRMAN NIMMER: Also, I gave Bob a  
12 copy of the study by the Netherlands law professor  
13 on photocopying, and there is a very good summary of  
14 the approaches there that you might peruse.

15 MR. FRASE: No, that has not been distributed  
16 yet.

17 VICE-CHAIRMAN NIMMER: Back to Dan's point,  
18 I agree. I think this is a really sticky problem if  
19 we are talking about any kind of a clearinghouse  
20 approach.

21 MR. LACY: It is a problem even if you are  
22 talking about voluntary.

23 VICE-CHAIRMAN NIMMER: Clearinghouse?  
24 voluntary or compulsory?

25 MR. LACY: Yes.

1  
2 VICE-CHAIRMAN NIMMER: Offhand, I don't know  
3 what the answer is short of new legislation, either  
4 legislation construing or expanding what the publisher  
5 requires to include that right, or if one went  
6 ultimately to compulsory license, compulsory license  
7 on the author, there are two other alternatives. One  
8 is simply no collective action at all, or the other  
9 is that the authors will all join voluntarily in  
10 such great numbers that it is not a problem, but I  
11 have some doubts that that will be the case, and so  
12 I think that is a very real problem.

13 MR. LACY: I would think that it is no great  
14 problem with the overwhelming majority of the journals  
15 that appear to be most frequently --

16 VICE-CHAIRMAN NIMMER: You mean the authors  
17 will j. r?

18 MR. LACY: Well, the publishers will just  
19 insist on that as part of the condition of publishing  
20 the article, and the authors want distribution because  
21 they are not writing primarily for income. That is,  
22 they contribute to a journal published by the American  
23 Chemical Society; works where we are dealing with a  
24 different class of authors who want their work dis-  
25 tributed.

1  
2 I would not anticipate that sort of result  
3 with a lot of journals of perhaps more intellectual  
4 significance.

12 5 MR. CAPP0\*: In connection with the library  
6 needing to know whether it has to go to a clearing-  
7 house, one of the difficulties that a private library  
8 now has is knowing when it is a public library, even  
9 though it may be performing a "non-profit" function.

10 It has been mentioned I think perhaps that  
11 if a private library joined an interlibrary network  
12 and makes publicly available information, that that  
13 might qualify it. I would believe that if the Commis-  
14 sion were of that opinion, it would be of interest.

15 VICE-CHAIRMAN NIMMER: That is something  
16 we have to think about.

17 MR. WEDGEWORTH: I am not so sure about  
18 that too, and I would like to ask Mr. Weil to comment  
19 on that. We never had trouble to determine which was  
20 a closed library and which was an open library, though  
21 it may be in a private firm.

22 MR. WEIL: I can only give you my own  
23 assumption that, for example, my library is a closed  
24 library, and that is an extreme because the government  
25 contracts and access to our site is limited and,

\* from the audience (unidentified individual)

1  
2 secondly, the people could only come in if we gave them  
3 permission and, thirdly, I am not criticizing our  
4 operation.

5           Some of these are manpower problems. We  
6 borrow books, but do not loan them. This may sound  
7 very sticky, but it is a different proposition. You  
8 can only do what you can do, and on that basis I would  
9 have to assume that we are not open because we seem to  
10 lack all of the things that I can think of that would  
11 characterize an open library.

12           The other side of the coin, though, is that  
13 some libraries in Exxon Corporation -- remember I'm  
14 only describing one library inside of the Exxon  
15 Library -- but some of the libraries in other locations --  
16 in fact, the only photocopying done by these other  
17 libraries is for their libraries. In other words, it  
18 is something that would seem to be a 108 type of  
19 proposition where that library is serving as an inter-  
20 library loan provider, so that in that case, since  
21 the question is in any other respect is that library  
22 an open library if it does not permit physical access  
23 to its premises, this is where you are getting into  
24 the definition of what is an open library.

25           We would rather be non-open, but some of

1  
2 our other libraries in Exxon Corporation actually  
3 permit visitors, and some of them provide copies in  
4 interlibrary loans and do no other photocopying.

5 I would say that is probably an open library  
6 under the house report. This is just philosophizing.

7 VICE-CHAIRMAN NIMMER: All right. Is there  
8 anything else? I think we are drawing to the end of  
9 the discussion.

10 Are there any comments that the staff wants  
11 to make by way of administration or anything else?

12 MR. LEVINE: I just wanted to mention that  
13 we have gone ahead with, if you recall, the two  
14 proposals that were given to you prior to the last  
15 meeting on the question of public interest input into  
16 the Commission on the issues before the Commission.

17 The committee that was established at the  
18 last meeting met with both of the contractors, and  
19 it was decided that the Commission members would like to go  
20 forward with the economic analysis proposed by the Public  
21 Interest Economic Center.

22 We have taken out, if you will, the outward  
23 aspects of that proposal -- in other words, that group  
24 will not go out to other consumer or public interest  
25 groups and/or public interest groups directly, but we

1  
2 have put that aspect of the proposals in the PISA,  
3 Public Interest Satellite Association group, and these  
4 two groups will work together and the economic analysis  
5 we hope will be prepared sometime in March. The PISA  
6 group will react to that and convene a conference of  
7 public interest groups in April.

8 From that the economic group will modify,  
9 revise and do whatever is necessary to its report and  
10 submit a final report in June.

11 There will be one further conference of the  
12 public interest groups subsequent to that, and then  
13 we will have testimony on the report and on the  
14 public interest group conferences at our July meeting,  
15 hopefully. I say "hopefully," because that is assum-  
16 ing that the groups are able to adhere to the timetable  
17 that they have set forth in their proposals.

18 VICE-CHAIRMAN NIMMER: Our thanks to you again,  
19 Dan Lacy, and McGraw Hill for your gracious hospitality  
20 and very comfortable facilities. Thank you very much.

21 MR. LACY: Glad to have you.

22 VICE-CHAIRMAN NIMMER: Any other business?

23 (There was no response.)

24 VICE-CHAIRMAN NIMMER: Do we know when we  
25 are meeting next?

1  
2 MR. LEVINE: We are meeting March 31st  
3 and April 1st in New York City.

4 VICE-CHAIRMAN NIMMER: All right. Thank  
5 you all very much.

6  
7 (Whereupon, at 11:45 A.M., an adjourn-  
8 ment was taken.)

9  
10 - - -